125-585

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 187.

BENJAMIN F. BOWERMAN AND HENRY A. BOWERMAN, PLAINTIFFS IN ERROR,

vs.

WILLIAM C. RODGERS AND FRANCIS C. WELCH, ASSIGNEES OF BENJAMIN F. BURGESS AND WALTER BURGESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 24, 1884.

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1 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because that in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between William C. Rogers and Francis C. Welch (as assignees of Benjamin F. Burgess and Walter Burgess), plaintiffs, and Benjamin F. Bowerman and Henry A. Bowerman, defendants, a manifest error hath happened, to the great damage of the said defendants, as by the record appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-four, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk*.

The foregoing writ is hereby allowed.

WM. J. WALLACE.

2 [Endorsed:] U. S. Supreme Court. Benjamin F. Bowerman & *al.*, plaintiffs in error, against William C. Rogers & *al.*, defendants in error. Writ of error. Stanley, Clarke & Smith, att'ys for pl'ffs in error, 160 Broadway. Servi. hereof admitted. Sept. 18, 1884. Wheeler & Souther, att'ys for def'ts in error.

[Stamped:] U. S. circuit court. Filed Sep. 29, 1884. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss*:

I, Timothy Griffith, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty-eight inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Benjamin F. Bowerman and Henry A. Bowerman, plaintiffs in error, against William C. Rogers and Francis C. Welch (as assignees of Benjamin F. Burgess and Walter Burgess), defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the second circuit, this thirteenth day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal U. S. Circuit Court, South. Dist., New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 U. S. Circuit Court.

BENJAMIN F. BURGESS and WALTER BURGESS
vs.
BENJAMIN F. BOWERMAN and HENRY A. BOWERMAN.

The clerk of the above court will please issue a summons in the above-entitled cause.

Dated N. Y., Dec. 23, 1882.

McDANIEL, WHEELER & SOUTHER,
Plaintiffs' Att'ys, 8 & 10 Pine St., N. Y. City.

(Endorsed:) U. S. circuit court. Benjamin F. Burgess and Walter Burgess *vs.* Benjamin F. Bowerman and Henry A. Bowerman. *Pracipe.* McDaniel, Wheeler & Souther, pl'ffs' att'ys. U. S. circuit court. Filed Dec. 23, 1882. Joseph M. Deuel, clerk.

4 United States Circuit Court for the Southern District of New York.

BENJAMIN F. BURGESS and WALTER BURGESS
against
BENJAMIN F. BOWERMAN and HENRY A. BOWERMAN.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 23rd day of December, in the year one thousand eight hundred and eighty-two.

[L. S.] J. M. DEUEL, *Clerk.*

McDANIEL, WHEELER & SOUTHER,
Plaintiffs' Attorneys.

Office and post-office address, 8 & 10 Pine street, New York.

(Endorsed:) I hereby certify that on the 27 day of December, 1882, at the city of New York, in my district, I per-
5 sonally served the within summons upon the within-named Benjamin F. Bowerman and Henry A. Bowerman by exhibiting to them the within original and at the same time leaving with

them a copy thereof. Dated April 6, 1883. Henry E. Knox, late U. S. marshal, S. D. N. Y. United States circuit court, southern district of New York. Benjamin F. Burgess and Walter Burgess *vs.* Benjamin F. Bowerman, Henry A. Bowerman. Summons. McDaniel, Wheeler & Souther, plaintiffs' attorneys. U. S. marshal's office, S. D. N. Y. Dec. 23, 1882. Received. U. S. circuit court. Filed Apr. 6, 1883. Timothy Griffith, clerk.

6 United States Circuit Court for the Southern District of New York.

BENJAMIN F. BURGESS and WALTER BURGESS
against
BENJAMIN F. BOWERMAN and HENRY A. BOWERMAN.

The plaintiffs in the above action respectfully show to this court that upon their information and belief they are, and during the times hereinafter mentioned were, copartners doing business in the city of Boston under the firm name of Benjamin Burgess & Sons, and are and then were citizens of the State of Massachusetts, and that the defendants are, and during the times hereinafter mentioned were, copartners doing business in the city of New York under the firm name of Bowerman Brothers, and are and then were citizens of the State of New York.

7 And thereupon the plaintiffs allege for a first cause of action:

First. During the times hereinafter mentioned the plaintiffs employed the defendants as their agents for certain valuable commissions paid to the defendants to enter in the United States custom-house, in the port of New York, certain sugars then and there about being imported into this country on the account of the plaintiffs on board the steamship "Santiago," amounting to seven hundred and eighty-one thousand and forty-six pounds, and to do all acts which should be necessary and proper respecting the ascertainment and liquidation of the duties thereon. The said sugars were consigned to the plaintiffs and were by the defendants, on behalf of the plaintiffs, entered at the said custom-house in the manner required by law.

Second. At the time of such importation and previous thereto a question had arisen between divers persons engaged in the business of importing sugars into the United States and the Government of the United States in regard to the proper tests by which it should be determined what duties were properly payable by the persons severally importing such sugars in respect of the several parcels of sugars imported by them, respectively.

In behalf of the Government of the United States, it was then and there claimed that the test by which such determination should be made should be that of the polariscope; whereas, on behalf of the plaintiffs and others engaged in said business, it was then and there claimed that the test by which said determination should be made should be the Dutch standard in color of sugar so imported, without regard to the polariscope test. These facts hereinbefore

alleged were well known to the defendants, and in making the entry aforesaid of said sugars, so as aforesaid imported on board the said steamer, and in attending, on the plaintiffs' behalf, to the adjustment of the duties thereon, they did, on behalf of the plaintiffs, claim and insist to the collector of the customs of the port of New York that the duties upon said sugars should be determined by said collector by the color thereof, according to the Dutch standard, without regard to the polariscope test; but the said collector of customs of said port ruled and determined that the test of the polariscope should be applied, and he further ruled and determined that the proper duty payable upon 719,582 pounds of said sugar, so as aforesaid imported on said steamer "Santiago," was 2¼ cents per pound; whereas the defendants, on behalf of the plaintiffs, claimed and insisted that the true duty assessable thereon, according to the laws of the United States in such case made and provided, was 2 cents per pound, which was the rate of duty collectible if the Dutch standard in color alone were to be taken as the test, without regard to the polariscope. The said collector further ruled and determined in reference to 61,464 pounds parcel of said sugar, so as aforesaid imported on said steamer "Santiago," that the true rate of duty which should be assessed thereon was 2 cents per pound; whereas the defendants, on behalf of the plaintiffs, claimed that the true rate of duty to be assessed, according to the laws of the United States, was 1⅞ cents per pound if the color of the sugar, according to the Dutch standard in color, was alone to be taken as the test; and the said plaintiffs were obliged to pay and did pay to the said collector on or about the 11th day of February, 1881, in order to obtain possession of said sugar, the duty thereon, according to the said decision of the said collector, at the rates aforesaid. In all the cases hereinbefore averred it was claimed by said collector and admitted by the defendants that the duty per pound when so ascertained should be increased by twenty-five per centum thereof; thereupon the defendants did, on behalf of these plaintiffs and as their agents and in pursuance of the laws of the United States in such case made and provided before or at the time of the payment of the duties aforesaid, make and deliver to the said collector a protest in writing, signed by the defendants, setting forth distinctly and specifically the grounds of objection to the amount claimed by the United States. The said defendants did also, on behalf of the plaintiffs, within ten days after the ascertainment and liquidation by the proper officers of the customs of the duties upon said sugars imported upon said steamer "Santiago," give notice in writing to the said collector on each entry, setting forth therein distinctly and specifically the grounds of their objections thereto. They did in like manner, within thirty days after the date of said ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, and the said Secretary of the Treasury rendered his decision upon said appeal adversely to the plaintiffs and confirmed the decision of the said collector.

8 The said protest and appeal were made and taken by the defendants in obedience to the instructions of these plaintiffs and in accordance with their own written agreement, which instruc-

tions and which written agreement are contained in the correspondence between the plaintiffs and defendants, of the material portions of which copies are hereunto annexed and marked Exhibits 1 to 15, both inclusive. In said exhibits the said polariscope test is mentioned and described as the dry test. A portion of said cargo is described in Exhibits 4, 6, & 8 by the word or mark "Tuinica;" a portion thereof is described in Exhibits 6 and 8 by the word or mark "Angelisa," and the said sugar is described as "Centrifugals" in Exhibits 7 and 9.

Third. Thereupon it became and was the duty of the defendants, as such agents, within ninety days after the said decision of the Secretary of the Treasury, to bring suit against such collector for the recovery of the difference in the amount between the duties so paid by them on behalf of these plaintiffs as aforesaid and the amount of the duties claimed by them to be properly payable upon said sugars, to wit, one quarter of a cent per pound plus twenty-five per centum, amounting in the aggregate to two thousand four hundred and forty $\frac{76}{100}$ dollars; but the said defendants, disregarding the said written instructions of the plaintiffs and the written agreement made by them as aforesaid, all of which are contained in the said exhibits, neglected to bring such suit, and therefore, pursuant to the provisions of the Revised Statutes of the United States, no suit could be maintained in any court for the recovery of the duties so exacted as aforesaid. They made no response to the letter, Exhibit 15, in respect to the matters therein referred to, and the plaintiffs relied upon their bringing suits in New York pursuant to the instructions therein contained, and consequently did not instruct any one else to bring such suits on behalf of the plaintiffs, which these plaintiffs would have done had the defendants notified them that they declined to follow the said instructions, which notification the defendants did not give to the plaintiffs.

Fourth. It has since been ruled and determined by the Supreme Court of the United States in the case of Merritt, collector of the port of New York, against S. and W. Welsh, affirming the judgment of the circuit court of the United States for the southern district of New York in the suit mentioned and referred to in said exhibits as the Welsh suit, that the contention aforesaid of the defendants on behalf of these plaintiffs, to wit: that the amount of duty payable and collectible upon the said sugar should be determined by the said Dutch standard in color exclusively without regard to the polariscope, was valid, and that the duties levied and collected upon sugar imported into the United States upon any other test than the Dutch standard in color mentioned in Schedule G of section 2504 of the Revised Statutes of the United States were erroneously and illegally exacted. Thereupon the Government of the United States refunded to all importers of sugars who had complied with the law in reference to the bringing of suits within ninety days after the decision of the Secretary of the Treasury upon an appeal from the decision of the collector of each port the amount of duties erroneously and illegally exacted of them as aforesaid, respectively; but the said Government of the United States is not liable to refund to

these plaintiffs the amount of duties so as aforesaid erroneously and illegally exacted from them upon and in respect of the said importation of sugars, because suit was not brought to recover the same within ninety days after the said decision by the Secretary of the Treasury, and by reason of the failure of the defendants to bring suit within such period the decision of the Secretary of the Treasury became final and conclusive.

Wherefore these plaintiffs aver that they have been damaged by the neglect of the defendants to comply with the instructions aforesaid contained in the said exhibits and with the agreement on the part of the defendants also therein contained to the amount of two thousand four hundred and forty $\frac{76}{100}$ dollars, with interest from February 11, 1881, which the defendants, although thereto requested, have not paid to these plaintiffs, nor any part thereof.

9 And thereupon the plaintiffs allege for a second cause of action:

First. During the times hereinafter mentioned the plaintiffs employed the defendants as their agents, for certain valuable commissions paid to the defendants, to enter in the United States custom-house in the port of New York certain sugars then and there about being imported into this country on account of the plaintiffs on board the bark "David Bugbee," amounting to nine hundred and fifty-six thousand eight hundred and fifty-two pounds, and to do all acts which should be necessary and proper respecting the ascertainment and liquidation of the duties thereon. The said sugars were consigned to the plaintiffs and were by the defendants, on behalf of the plaintiffs, entered at the said custom-house in the manner required by law.

Second. At the time of such importation and previous thereto a question had arisen between divers persons engaged in the business of importing sugars into the United States and the Government of the United States in regard to the proper tests by which it should be determined what duties were properly payable by the persons severally importing such sugars in respect of the several parcels of sugars imported by them, respectively.

In behalf of the Government of the United States, it was then and there claimed that the test by which such determination should be made should be that of the polariscope. Whereas, on behalf of the plaintiffs and others engaged in said business, it was then and there claimed that the test by which such determination should be made should be the Dutch standard in color of sugar so imported, without regard to the polariscope test. These facts hereinbefore alleged were well known to the defendants, and in making the entry aforesaid of said sugars, so as aforesaid imported on board the said bark, and in attending, on the plaintiffs' behalf, to the adjustment of the duties thereon, they did, on behalf of the plaintiffs, claim and insist to the collector of the customs of the port of New York that the duties upon said sugars should be determined by said collector by the color thereof, according to the Dutch standard, without regard to the polariscope test; but the said collector of customs of said port ruled and determined that the test of the polariscope should be applied,

and he further ruled and determined that the proper duty payable upon 951,010 pounds, of said sugar, so as aforesaid imported on said bark "David Bugbee," was 2¼ cents per pound; whereas the defendants, on behalf of the plaintiffs, claimed and insisted that the true duty assessable thereon according to the laws of the United States in such case made and provided, was 2 cents per pound, which was the rate of duty collectible if the Dutch standard in color alone were to be taken as the test, without regard to the polariscope. The said collector further ruled and determined in reference to 5,842 pounds parcel of said sugar, so as aforesaid imported on said bark "David Bugbee," that the true rate of duty which should be assessed thereon was 2 cents per pound; whereas the defendants, on behalf of the plaintiffs, claimed that the true rate of duty to be assessed, according to the laws of the United States, was 1¾ cents per pound if the color of the sugar, according to the Dutch standard in color, was alone to be taken as the test; and the said plaintiffs were obliged to pay and did pay to the said collector, on or about the 20th day of May, 1881, in order to obtain possession of said sugar, the duty thereon, according to the said decision of the said collector, at the rates aforesaid. In all the cases hereinbefore averred it was claimed by said collector and admitted by the defendants that the duty per pound, when so ascertained, should be increased by twenty-five per centum thereof. Thereupon the defendants did, on behalf of these plaintiffs and as their agents and in pursuance of the laws of the United States in such case made and provided, before or at the time of the payment of the duties aforesaid, make and deliver to the said collector a protest in writing, signed by the defendants, setting forth distinctly and specifically the grounds of objection to the amount claimed by the United States. The said defendants did also, on behalf of the plaintiffs, within ten days after the ascertainment and liquidation by the proper officers of the customs of the duties upon said sugars imported upon said bark "David Bugbee," give notice in writing to the said collector on each entry, setting forth therein distinctly and specifically the grounds of their objections thereto. They did in like manner, within thirty days after the date of said ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, and the said Secretary of the Treasury rendered his decision upon said appeal adversely to the plaintiffs and confirmed the decision of the said collector.

10 The said protest and appeal were made and taken by the defendants in obedience to the instructions of these plaintiffs and in accordance with their own written agreement, which instructions and which written agreement are contained in the correspondence between the plaintiffs and defendants, of the material portions of which copies are hereunto annexed and marked Exhibits 1 to 15, both inclusive. In said exhibits the said polariscope test is mentioned and described as the dry test.

Third. Thereupon it became and was the duty of the defendants, as such agents, within ninety days after the said decision of the Secretary of the Treasury, to bring suit against such collector for the recovery of the difference in the amount between the duties so paid

by them on behalf of these plaintiffs as aforesaid and the amount of the duties claimed by them to be properly payable upon said sugars, to wit, one-quarter of a cent per pound plus twenty-five per centum, amounting in the aggregate to $2,990.17, two thousand nine hundred and ninety $\frac{17}{100}$ dollars; but the said defendants, disregarding the said written instructions of the plaintiffs and the written agreement made by them as aforesaid, all of which are contained in the said exhibits, neglected to bring such suit, and therefore, pursuant to the provisions of the Revised Statutes of the United States, no suit could be maintained in any court for the recovery of the duties so exacted as aforesaid. They made no response to the letter, Exhibit 15, in respect to the matters therein referred to, and the plaintiffs relied upon their bringing suits in New York pursuant to the instructions therein contained, and consequently did not instruct any one else to bring such suits on behalf of the plaintiffs, which these plaintiffs would have done had the defendants notified them that they declined to follow the said instructions, which notification the defendants did not give to the plaintiffs.

Fourth. It has since been ruled and determined by the Supreme Court of the United States in the case of Merritt, collector of the port of New York, against S. and W. Welsh, affirming the judgment of the circuit court of the United States for the southern district of New York in the suit mentioned and referred to in said exhibits as the Welsh suit, that the contention aforesaid of the defendants on behalf of these plaintiffs, to wit, that the amount of duty payable and collectible upon the said sugar should be determined by the said Dutch standard in color exclusively without regard to the polariscope, was valid and that the duties levied and collected upon sugar imported into the United States upon any other test than the Dutch standard in color mentioned in Schedule G of section 2504 of the Revised Statutes of the United States were erroneously and illegally exacted. Thereupon the Government of the United States refunded to all importers of sugars who had complied with the law in reference to the bringing of suits within ninety days after the decision of the Secretary of the Treasury upon an appeal from the decision of the collector of each port the amount of duties erroneously and illegally exacted of them as aforesaid, respectively; but the said Government of the United States is not liable to refund to these plaintiffs the amount of duties so as aforesaid erroneously and illegally exacted from them upon and in respect of the said importation of sugars, because suit was not brought to recover the same within ninety days after the said decision by the Secretary of the Treasury, and by reason of the failure of the defendants to bring suit within such period the decision of the Secretary of the Treasury became final and conclusive.

Wherefore these plaintiffs aver that they have been damaged by the neglect of the defendants to comply with the instructions aforesaid contained in the said exhibits and with the agreement on the part of the defendants also therein contained to the amount of two thousand nine hundred and ninety and $\frac{17}{100}$ dollars, with interest

from May 20, 1881, which the defendants, although thereto requested, have not paid to these plaintiffs — any part thereof.

11 And thereupon the plaintiffs allege for a third cause of action—

First. During the times hereinafter mentioned the plaintiffs employed the defendants as their agents, for certain valuable commissions paid to the defendants, to enter in the United States custom-house in the port of New York certain sugars then and there about being imported into this country on account of the plaintiffs on board the steamship "Santiago," amounting to nineteen thousand seven hundred and forty-six pounds, and to do all acts which should be necessary and proper respecting the ascertainment and liquidation of the duties thereon. The said sugars were consigned to the plaintiffs, and were by the defendants, on behalf of the plaintiffs, entered at the said custom-house in the manner required by law.

Second. At the time of such importation and previous thereto a question had arisen between divers persons engaged in the business of importing sugars into the United States and the Government of the United States in regard to the proper tests by which it should be determined what duties were properly payable by the persons severally importing such sugars, in respect of the several parcels of sugars imported by them respectively.

In behalf of the Government of the United States it was then and there claimed that the test by which such determination should be made should be that of the polariscope; whereas on behalf of the plaintiffs and others engaged in said business it was then and there claimed that the test by which such determination should be made should be the Dutch standard in color of sugar so imported, without regard to the polariscope test. These facts hereinbefore alleged were well known to the defendants, and in making the entry aforesaid of said sugars so as aforesaid imported on board the said steamer and in attending, on the plaintiffs' behalf, to the adjustment of the duties thereon they did, on behalf of the plaintiffs, claim and insist to the collector of the customs of the port of New York that the duties upon said sugars should be determined by said collector by the color thereof, according to the Dutch standard, without regard to the polariscope test; but the said collector of customs of said port ruled and determined that the test of the polariscope should be applied, and he further ruled and determined that the proper duty payable upon 19,746 pounds of said sugar so as aforesaid imported on said steamer "Santiago" was 2 cents per pound; whereas the defendants, on behalf of the plaintiffs, claimed and insisted that the true duty assessable thereon, according to the laws of the United States in such case made and provided, was — cents per pound, which was the rate of duty collectible if the Dutch standard in color alone were to be taken as the test, without regard to the polariscope; and the said plaintiffs were obliged to pay and did pay to the said collector, on or about the fourth day of October, 1881, and the 21 day of November, 1881, in order to obtain possession of said sugar, the duty thereon, according to the said decision of the said collector, at the rates aforesaid. In all the cases hereinbefore averred it was claimed

by said collector and admitted by the defendants that the duty per pound, when so ascertained, should be increased by twenty-five per centum thereof. Thereupon the defendants did, on behalf of these plaintiffs and as their agents and in pursuance of the laws of the United States in such case made and provided, before or at the time of the payment of the duties aforesaid, make and deliver to the said collector a protest in writing, signed by the defendants, setting forth distinctly and specifically the grounds of objection to the amount claimed by the United States. The said defendants did also, on behalf of the plaintiffs, within ten days after the ascertainment and liquidation by the proper officers of the customs of the duties upon said sugars imported upon said steamer "*Steamer*," give notice in writing to the said collector on each entry, setting forth therein distinctly and specifically the grounds of their objections thereto. They did, in like manner, within thirty days after the date of said ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, and the said Secretary of the Treasury rendered his decision upon said appeal adversely to the plaintiffs and confirmed the decision of the said collector.

12 The said protest and appeal were made and taken by the defendants in obedience to the instructions of these plaintiffs and in accordance with their own written agreement, which instructions and which written agreement are contained in the correspondence between the plaintiffs and defendants, of the material portions of which copies are hereunto annexed and marked Exhibits 1 to 15, both inclusive. In said exhibits the said polariscope test is mentioned and described as the dry test.

Third. Thereupon it became and was the duty of the defendants as such agents, within ninety days after the said decision of the Secretary of the Treasury, to bring suit against such collector for the recovery of the difference in the amount between the duties so paid by them on behalf of these plaintiffs as aforesaid and the amount of the duties claimed by them to be properly payable upon said sugars, to wit, — of a cent per pound, plus twenty-five per centum, amounting in the aggregate to $61.71, sixty-one $\frac{71}{100}$ dollars; but the said defendants, disregarding the said written instructions of the plaintiffs and the written agreement made by them as aforesaid, all of which are contained in the said exhibits, neglected to bring such suit, and therefore, pursuant to the provisions of the Revised Statutes of the United States, no suit could be maintained in any court for the recovery of the duties so exacted as aforesaid.

They made no response to the letter, Exhibit 15, in respect to the matters therein referred to, and the plaintiffs relied upon their bringing suits in New York pursuant to the instructions therein contained, and consequently did not instruct any one else to bring such suits on behalf of the plaintiffs, which these plaintiffs would have done had the defendants notified them that they declined to follow the said instructions, which notification the defendants did not give to the plaintiffs.

Fourth. It has since been ruled and determined by the Supreme Court of the United States, in the case of Merritt, collector of the

port of New York, against S. and W. Welsh, affirming the judgment of the circuit court of the United States for the southern district of New York in the suit mentioned and referred to in said exhibits as the Welsh suit, that the contention aforesaid of the defendants on behalf of these plaintiffs, to wit, that the amount of duty payable and collectible upon the said sugar should be determined by the said Dutch standard in color exclusively, without regard to the polariscope, was valid, and that the duties levied and collected upon the sugar upon any other test than the Dutch standard in color mentioned in Schedule G of section 2504 of the Revised Statutes of the United States were erroneously and illegally exacted. Thereupon the Government of the United States refunded to all importers of sugars who had complied with the law in reference to the bringing of suits within ninety days after the decision of the Secretary of the Treasury, upon an appeal from the decision of the collector of each port, the amount of duties erroneously and illegally exacted of them as aforesaid, respectively; but the said Government of the United States is not liable to refund to these plaintiffs the amount of duties so as aforesaid erroneously and illegally exacted from them upon and in respect of the said importation of sugars, because suit was not brought to recover the same within ninety days after the said decision by the Secretary of the Treasury, and by reason of the failure of the defendants to bring suit within such period the decision of the Secretary of the Treasury became final and conclusive.

Wherefore these plaintiffs aver that they have been damaged by the neglect of the defendants to comply with the instructions aforesaid contained in the said exhibits, and with the agreement on the part of the defendants, also therein contained, to the amount of sixty-one $\frac{71}{100}$ dollars, with interest from November 1, 1881, which the defendants, although thereto requested, have not paid to these plaintiffs nor any part thereof.

Wherefore these plaintiffs demand judgment against the defendants for five thousand four hundred and ninety-two $\frac{64}{100}$ dollars, with interest on two thousand four hundred and forty $\frac{75}{100}$ dollars, parcel thereof, from February 11, 1881, and with interest on two thousand nine hundred and ninety $\frac{17}{100}$ dollars, parcel thereof, from May 20, 1881, and with interest on sixty-one $\frac{71}{100}$ dollars, parcel thereof, from November 1, 1881, or for such other relief as may be just, together with the costs of this action.

McDANIEL, WHEELER & SOUTHER,
Plaintiffs' Attorneys.

13 *Plaintiffs to Defendants. Exhibit* 1.

JAN. 27, '81.

We notice the tests and have seen the sample. They are certainly very beautiful sugars for their class. Now we feel anxious as to the duties on the dry test, but if they should be decided against us we must protest as soon as duties are paid and place the matter in the hands of a first-class lawyer, the one employed by Messrs. Knowlton, perhaps, unless you know of a better, to commence the suit as soon as possible; but we hope all this will not be necessary.

We suppose you will take proper care of them on the wharf. How long can they remain on the wharf? Of course we wish them insured.

If the sugars are marked up on dry test it is necessary to formally protest against the decision of the collector and then appeal to the Secretary of the Treasury. This is the first step, and when the duties are paid to enter suit.

Defendants to Plaintiffs. Exhibit 2.

JAN'Y 28TH, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received and contents noted, all of which will be duly attended to.

Plaintiffs to Defendants. Exhibit 3.

FEB'Y 9, '81.

We are in receipt of yours of yesterday and note the Government test of our sugars per Santiago. Of course you will duly protest against the marking up of the dry test, and we hope the Government will have to pay it back some time.

Plaintiffs to Defendants. Exhibit 4.

FEB'Y 17, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have your favor of yesterday. There is no change in our sugar market; business is still sluggish. We are delivering the "Tuinica," having paid duties on invoice. When the entry is liquidated will duly protest against the polariscope when above color classification.

Plaintiffs to Defendants. Exhibit 5.

FEB'Y 28, 1881.

We suppose it is now time to make formal protest as to the marking up on dry test.

Defendants to Plaintiffs. Exhibit 6.

MARCH 1, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received. We went to the custom-house to-day to get liquidation of duties on "Angelita" and "Tuinica," but it was not ready; as soon as it is will make formal protest.

Defendants to Plaintiffs. Exhibit 7.

MARCH 4, 1881.

We have just got liquidation of the centrifugals (a copy of which we send you) and shall enter protest and appeal to-morrow.

Plaintiffs to Defendants. Exhibit 8.

MARCH 5TH, 1881.

Of course, you protest against the marking up in dry test in the Tuinica as well as the Angelita.

14 *Defendants to Plaintiffs. Exhibit* 9.

MARCH 5, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have lodged protest and appeal against additional duties levied on centrifugals *ex* Santiago on Polariscope test with collector of the port.

Plaintiffs to Defendants. Exhibit 10.

MARCH 31, 1881.

Of course, you will duly appeal from the Government assessing duties by test.

Plaintiffs to Defendants. Exhibit 11.

APRIL 16, 1881.

We are in receipt of your favor of yesterday enclosing the reply of the Secretary of the Treasury to your appeal of March 5, regarding sugars *ex* Santiago, Jan. 25th. We would await the decision in the Welch suit before commencing proceedings, if there is time.

Please keep us posted in the sugar case.

Defendants to Plaintiffs. Exhibit 12.

APRIL 15, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have your favor of yesterday, and enclose herewith the Secretary of the Treasury's reply to our appeal of March 5th (sugars per "Santiago," Jan. 25, '81). The collector's decision is affirmed. We suppose you will wait the decision in the Welch suit before commencing proceedings.

Please advise us.

Defendants to Plaintiffs. Exhibit 13.

APRIL 27, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received. The Kioto sugars are about half out of ship, and we send you to-night by express samples and tests of each mark. Our market is quiet but strong. We hear that the Government has decided to appeal from the decision (in New York) in the Welch case. Sales reported as below.

Defendants to Plaintiffs. Exhibit 14.

JUNE 18, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We presume you have in mind the "Santiago's" cargo centrifugal "Angelita" which arrived here July 6th, 1880, the most of which was raised on polariscope test one-fourth cent and 25 per cent. above the legitimate rate of entry on Dutch standard, and will commence suit against the Government in due season.

Plaintiffs to Defendants. Exhibit No. 15.

JUNE 20, 1881.

We have your favor of the 18th, in which you say, "We presume you have in mind the Santiago's cargo centrifugal Angelita which arrived July 6, '89, the most of which was raised on polariscope test one-fourth and 25 per cent. above the legitimate rate of duty on Dutch standard, and will commence suit against the Government in due season."

The cargo you refer to did not pay at all, as we understand, duty above the Dutch standard, it having just escaped on dry test.

Of course, we must not let any of our cases escape due attention. We attend here to all our Boston cases, and enter suits as fast as they come around, and we suppose you can do the same as our agents in New York. Are we right? Please look into every case and keep us timely informed, and whether there is anything for us to do personally or by power.

15 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Everett P. Wheeler, being duly sworn, says that he is one of the attorneys for the plaintiffs in the above-entitled action, and that the foregoing complaint is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. He further says that the reason why this verification is not made by the plaintiffs is that they are not nor is either of them within the city and county of New York, in which county deponent resides, and that the grounds of his information as to the matters stated in said complaint are the copies of the correspondence therein referred to, the entries at the New York custom-house, and the opinion of the supreme court therein mentioned.

EVERETT P. WHEELER.

Sworn to this 3d day of January, —, before me—
[SEAL.] EDWARD H. H. FORDER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

16 (Endorsed:) U. S. circuit court for the southern district of New York. Benjamin F. Burgess and Walter Burgess against

Benjamin F. Bowerman and Henry A. Bowerman. Complaint. McDaniel, Wheeler & Souther, plaintiffs' attorneys, 8 & 10 Pine street, New York. Due service of a copy of this complaint is hereby admitted. January 4, 1883. Edmund Coffin, Jr., def'ts' att'y. U. S. circuit court. Filed Aug. 8, 1884. Timothy Griffith, clerk.

17 United States Circuit Court for the Southern District of New York.

BENJAMIN F. BURGESS and WALTER BURGESS
against
BENJAMIN F. BOWERMAN and HENRY A. BOWERMAN.

The defendants in the above action answer the complaint herein, upon their information and belief, as follows:

I. They admit that the plaintiffs are and were at the times mentioned in the complaint copartners doing business under the firm name of Benjamin Burgess and Sons, and citizens of the State of Massachusetts. They allege that they have no information sufficient to form a belief whether the person named as plaintiff herein under the name of Benjamin F. Burgess is the Benjamin Burgess named in said firm name, but they allege, on their belief, that if he is that person the person named therein as Walter Burgess is not his son; and whether said Benjamin F. Burgess be or be not the Benjamin Burgess named in the said firm name, they allege, on information and belief, that the said plaintiffs were at the times mentioned in the complaint carrying on their said business in the name of an
18 alleged partner, who was not interested in the same, without the consent in writing of such person or his legal representatives, and that such business was so conducted in violation of the laws of both the States of New York and Massachusetts.

II. The defendants, further answering, admit that they are and were, during the times mentioned in the complaint, copartners doing business in the city of New York and members of the firm of Bowerman Brothers, and that they are and then were citizens of the State of New York.

They allege that their business, which they are and then were conducting, was and is that of sugar brokers, consisting in the negotiation of sales of sugars which belong to other people, the collection of the proceeds of such sales, the payment out of such proceeds of any charges upon the goods sold for duties, freight, storage, or other incidental expenses, and the transmission of the remainder of the proceeds of such sales in accordance with the instructions which they receive from the owners of the same.

That when such goods were or are sent to them from places outside of the United States and are sold to be delivered within the United States so as to be liable to duty it is and was an incidental portion of their business to employ a custom-house broker to see to the formal entry of the sugars and the liquidation of the duties upon the same, for which service a charge is made by such custom-
19 house broker and deducted by them from the proceeds of the sale as an incidental expense.

That during such times neither of said defendants was a lawyer or in any way authorized to practice in the courts of the United States nor any court, nor was any person so authorized to practice connected in any manner with the firm of Bowerman Brothers; that the nature of the business so conducted by Bowerman Brothers was during all of those times well known to the plaintiffs, and they also well knew that no one of the defendants nor of said firm claimed to be authorized to practice as an attorney.

And, further answering the complaint, these defendants admit that on or about the 25th day of January, 1881, certain sugars were imported into this country on the steamship Santiago, amounting in all to 1,115,476 gross pounds weight, and the firm of Bowerman Brothers were requested to receive the same, to enter them in the custom-house in the city of New York, to ascertain the duties thereon, to sell the same under instructions from the firm of Benjamin Burgess and Sons; out of the proceeds of such sale to pay such duties, as well as freight charges, storage, and other incidental expenses, and a commission to themselves of one-half of one per cent. upon the total amount realized upon the sale as the entire compensation to themselves for services in connection therewith, and to remit the remainder of the proceeds of such sale to said Benjamin Burgess and Sons; that, under said instructions, they did receive said ship-
20 ment upon the 25th day of January, 1881, entered the same in the United States custom-house in the port of New York, ascertained and had liquidated the duties thereon, and sold the goods under instructions from said Benjamin Burgess and Sons; that the said sugars were sold and paid for as follows:

1881, Feb. 11, in cash		$11,752 26
" " 19, " "		25,000 00
" " 26, " "		15,592 97

The duties upon the same were paid as follows:

1881, Feb. 2, in cash		$9,783 22
" " 11, " "		9,785 00
" " 17, " "		5,044 48
" Mch 10, " "		2,304 16

Accounts of the sale and disposition of the proceeds of sale *was* rendered to Benjamin Burgess and Sons on the 8th day of March, 1881, of which copies are hereto annexed, marked Schedules A and B, and on the 10th March, 1881, said plaintiffs remitted to the defendants the balance due to the firm of Bowerman Brothers upon those accounts of $1,971.42 in full settlement of the same; that the total amount received by the defendants for their entire services in the matter was the sum of $402.14, and that after the 8th day of March, 1881, no money or thing of value belonging to the consignor of said goods nor to the firm of Benjamin Burgess and Sons, in connection with this shipment, remained in the hands of these defendants; but the transaction was completed, all the services which
21 the defendants had been employed to perform in regard to those goods had been rendered and paid for, and the account was stated, accepted, and closed.

The defendants further admit that at the time of such importation and previous thereto a question had arisen in regard to the proper test of that class of sugars in the calculation of duties; that the question involved an amount in regard to a part of the sugars so received by them by the steamship Santiago of one-quarter cent per pound and 25 per cent added.

That the collector of the United States custom-house did require the payment of this amount in addition to the duties admitted to be legal, and at the time of payment the custom-house broker employed by the defendants did make due protest as required by the laws of the United States, and give formal notice thereof and appeal to the Secretary of the Treasury, who decided said appeal adversely to the importer and confirmed the decision of said collector, such decision being rendered on the 13th day of April, 1881; that full information of these several acts was given by the defendants to the plaintiffs immediately after the same were done; that the defendants and neither of them were ever employed by the plaintiffs or by anybody else to bring suit against anybody for the return of the duties so paid, nor any part thereof, nor were they ever paid to do any such thing, nor were they ever furnished with any money or thing of value with which to employ the services of any attorney in any suit or action at law with a view to recover any excess
22 of duties required by the collector to be paid upon these goods.

They further admit that in an action at law brought by one Welsh against one Edwin A. Merritt, collector of the port of New York, a judgment was recovered by the plaintiff against the defendant in the circuit court of the United States for the southern district of New York, and that on or about the month of October, 1881, this judgment was affirmed by the Supreme Court of the United States, and that since said litigation the Government of the United States, through the Secretary of the Treasury, has repaid to certain persons moneys claimed to have been erroneously charged and collected for duties upon sugars of the character of some of those above mentioned.

They further allege, upon information and belief, that if it shall be shown to the satisfaction of the Secretary of the Treasury that in the case of the duties so paid as aforesaid more money has been paid to the said collector than the law requires should have been paid, it is the duty of the Secretary of the Treasury, according to the statutes of the United States, to draw his warrant upon the Treasurer in favor of the person entitled to the overpayment directing the Treasurer to refund the same out of any money in the Treasury not otherwise appropriated; that these defendants cannot help it if the said officials fail to perform their duties in that regard.

And, further answering, these defendants admit that the
23 Exhibit- B annexed to the complaint are extracts from certain letters which form a small portion of a large correspondence between the firms of Benjamin Burgess and Sons and Bowerman Brothers during the time mentioned; but they allege that they never, by writing or otherwise, made any agreement with the

plaintiffs in regard to the subject-matter other than that hereinabove specified.

And, further answering, they deny, on information and belief, that the plaintiffs have been damaged by any acts of the defendants or by any neglect of the defendants in any amount whatsoever.

And, further answering the said complaint, so far as the first cause of action is concerned, they say that they have no knowledge or information in regard to the facts and circumstances therein alleged except as above specified, and therefore they deny the same except as herein admitted, qualified, or otherwise answered.

III. They further allege, on information and belief, that in accordance with the general usage in the State of New York they could not have employed a responsible attorney, solicitor, or proctor to have commenced suits for such alleged overpayments of duties without paying him for his services and making themselves liable for his reasonable compensation in that regard in an amount exceeding the total commissions so charged for the business above mentioned, and, possibly, to the amount of the entire alleged overcharge, and that the plaintiffs knew or might have known this.

24 IV. And, answering the second cause of action alleged in the complaint, these defendants repeat all the allegations of this answer heretofore set forth; and, further answering, they admit that on or about the 17th day of March, 1881, certain sugars were imported into this country on the bark "David Bugbee," amounting in all to 1,080,556 gross pounds in weight, and the firm of Bowerman Brothers were requested to receive the same, to enter them in the custom-house in the city of New York, to ascertain the duties thereon, to sell the same under instructions from the firm of Benjamin Burgess and Sons; out of the proceeds of the sale to pay such duties as well as freight charges, storage, and other incidental expenses and a commission to themselves of one-half of one per cent. upon the total amount realized upon the sale as the entire compensation to themselves for all services in connection therewith, and to remit the remainder of the proceeds of such sale to said Benjamin Burgess and Sons; that under said instructions they did receive said shipment upon the 17th March, 1881, entered the same in the United States custom-house in the port of New York, ascertained and had liquidated the duties thereon, and sold the goods under instructions from said Benjamin Burgess and Sons; that said sugars were sold and paid for on May 18, 1881; the duties upon the same, amounting to $26,892.21, were paid on or before June 16, 1881; accounts of the sale and disposition of the proceeds were rendered to Benjamin Burgess and Sons on the 16th day of June, 1881, of which copies are hereto annexed, marked Schedules

25 C and D, and on the same day the firm of Bowerman Brothers remitted to the plaintiffs the balance due upon those accounts of $3,353.45 in full settlement of the same.

That the total amount of the commission charged by the defendants for their services in the matter was the sum of $407.71, of which amount the plaintiffs demanded and received from the defendants

one-half, or $203.85, and that after the 16th day of June, 1881, no money or thing of value belonging to the consignor of those goods nor to the firm of Benjamin Burgess and Sons in connection with this shipment remained in the hands of these defendants, but the transaction was completed, all the services which the defendants had been employed to perform in regard to these goods had been rendered and paid for, and the plaintiffs had insisted upon receiving and had received one-half of such payment for said services and the account was stated, accepted, and closed; that in the settlement of the duties chargeable against these goods the collector of the United States for the port of New York did require the payment of an amount in addition to the duties admitted to be legal, and at the time of payment the custom-house broker employed by the defendants did make due protest as required by the laws of the United States and give formal notice thereof and appeal to the Secretary of the Treasury, who decided said appeal adversely to the importer and confirmed the decision of said collector, such decision being rendered on the 27th May, 1881; that full information
26 of these several acts was given to the plaintiffs immediately after the same were done; that the defendants and neither of them were ever employed by the plaintiffs or by anybody else to bring suit against anybody for the return of the duties so paid nor any part thereof, nor were they ever paid to do any such thing, nor were they ever furnished with any money or thing of value with which to employ the services of any attorney in any suit or action at law with a view to recover any excess of duties required by the collector to be paid upon these goods. They deny that they ever made any agreement in regard to this shipment other than that stated.

They deny, on information and belief, that the plaintiffs have been damaged by any acts of the defendants or by any neglect of theirs in any amount whatsoever.

And, further answering the said complaint, so far as the second cause of action is concerned, they say they have no knowledge or information in regard to the facts and circumstances therein alleged, except as above specified, and therefore they deny the same except as herein admitted, qualified, or otherwise answered.

V. They further allege, on information and belief, that, in accordance with the general usage in the State of New York, they could not have employed a responsible attorney, solicitor, or proctor to have commenced suits for such alleged overpayment of duties without paying him for his services and making themselves liable for his reasonable compensation in that regard in an amount ex-
27 ceeding the total commission so received by them for the business above mentioned and possibly to the amount of the entire alleged overcharge, and that the plaintiffs knew or might have known this.

VI. And, answering the third cause of action alleged in the complaint, these defendants repeat all the allegations of this answer heretofore set forth; and, further answering, they admit that on about the 6th day of September, 1881, certain sugars were imported into this

country on the steamer "Santiago," amounting in all to 1,594,796 gross pounds in weight, and the firm of Bowerman Brothers were requested to receive the same, to enter them in the custom-house in the city of New York, to ascertain the duties thereon, to sell the same under instructions from the firm of Benjamin Burgess and Sons; out of the proceeds of the sale to pay such duties, as well as freight charges, storage, and other incidental expenses, and a commission to themselves of one-half of one per cent. upon the total amount realized upon the sale as the entire compensation to themselves for all services in connection therewith, and to remit the remainder of the proceeds of such sale to said Benjamin Burgess and Sons; that under said instructions they did receive said shipment upon the 6th day of September, 1881, entered the same in the United States custom-house in the port of New York, ascertained and had liquidated the duties thereon, and sold the goods under instructions from said Benjamin Burgess and Sons; that said sugars were
28 sold and paid for on November 29, 1881; the duties upon the same, amounting to $34,121.19, were paid on or before 29 November, 1881; accounts of the sale and disposition of the proceeds were rendered to Benjamin Burgess and Sons on the 29th day of November, 1881, of which copies are hereto annexed, marked Schedules E and F, and on the same day Bowerman Brothers remitted to the plaintiffs the balance due upon those accounts of $53,510.98 in full settlement of the same.

That the total amount of the commission charged by the defendants for their services in the matter was the sum of $561.55, of which amount the plaintiffs demanded and received from the defendants one-half, or $280.77; and that after the 29th day of November, 1881, no money or thing of value belonging to the consignor of those goods nor to the firm of Benjamin Burgess and Sons in connection with this shipment remained in the hands of these defendants, but the transaction was completed, all the services which the defendants had been employed to perform in regard to those goods had been rendered and paid for, and the plaintiffs had insisted upon receiving and had received one-half of such payment for said services, and the account was stated, accepted, and closed.

That in the settlement of the duties chargeable against these goods the collector of the United States for the port of New York did require the payment of an amount in addition to the duties admitted to be legal, and at the time of payment the custom-house broker employed by the defendants did make due protest as required
29 by the laws of the United States, and give formal notice thereof and appeal to the Secretary of the Treasury, who decided said appeal adversely to the importer and confirmed the decision of said collector, such decision being rendered on the 7th November, 1881; that full information of these several acts was given to the plaintiffs immediately after the same was done; that the defendants and neither of them were ever employed by the plaintiffs or by anybody else to bring suit against anybody for the return of the duties so paid nor any part thereof, nor were they ever paid to do any such thing, nor were they ever furnished with any money

or thing of value with which to employ the services of any attorney in any suit or action at law with a view to recover any excess of duties required by the collector to be paid upon these goods. They deny that they ever made any agreement in regard to this shipment other than that stated. They deny, on information and belief, that the plaintiffs have been damaged by any acts of the defendants or by any neglect of theirs in any amount whatsoever.

And, further answering the said complaint, so far as the third cause of action is concerned, they say that they have no knowledge or information in regard to the facts and circumstances therein alleged except as above specified, and therefore they deny the same except as herein admitted, qualified, or otherwise answered.

30 VII. They further allege, on information and belief, that in accordance with the general usage in the State of New York they could not have employed a responsible attorney, solicitor, or proctor to have commenced suits for such alleged overpayment of duties without paying him for his services and making themselves liable for his reasonable compensation in that regard in an amount exceeding the total commission so received by them for the business above mentioned, and possibly to the amount of the entire alleged overcharge, and that the plaintiffs knew or might have known this.

Wherefore the defendants pray that the said complaint may be dismissed, and that they have their costs of this defense.

EDMUND COFFIN, JR.,
Att'y for Def'ts.

Office & post office address, No. 4 Pine St., N. Y. C.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Henry A. Bowerman and Benjamin F. Bowerman, being duly sworn, saith that they are the defendants above named, and that they have read the foregoing answer and know the contents thereof, and that the same is true, to their knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters they believe them to be true.

HENRY A. BOWERMAN.
B. F. BOWERMAN.

31 Sworn to before me this 8th day of February, 1883.
[L. S.] ISIDOR GRAYHEAD,
Notary Public, N. Y. Co.

(Endorsed:) United States circuit court for the southern district of New York. Benjamin F. Burgess and Walter Burgess against Benjamin F. Bowerman and Henry A. Bowerman. Exhibits, separate copy. Answer. Edmund Coffin, Jr., attorney for defendants. Office and post office address, Nos. 4 and 6 Pine street, New York city. To McDaniel, Wheeler & Souther, attorneys for plaintiffs. Rec'd Feb'y 10. Admitted service. U. S. circuit court. Filed Aug. 8, 1884. Timothy Griffith, clerk.

32 At a stated term of the circuit court of the United States of America for the southern district of New York, in the city of New York, on Wednesday, the sixteenth day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Wm. J. Wallace, circuit judge.

BENJAMIN F. BURGESS *et al. vs.* BENJAMIN F. BOWERMAN *et al.*

Now come the plaintiffs, by Everett P. Wheeler, their attorney, and move the trial of this cause. Likewise come the defendants, by Edmund Coffin, Jr., their attorney. Thereupon a jury is empanelled and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel, on motion of Mr. Wheeler, the court directs the jury to find a verdict for the plaintiffs for the sum of $6,105.77. Thereupon the jury render a verdict, whereby they find a verdict for the plaintiffs in the sum of $6,105.77.

On motion of Mr. Coffin the court orders that the defendants have a stay of proceedings on said verdict for thirty days.

33 At a stated term of the United States circuit court for the southern district of New York, held at the court-rooms thereof, in the post-office building, in the city of New York, the 6th day of March, 1884.

Present: Hon. William J. Wallace, circuit judge.

BENJAMIN F. BURGESS & Ano'r

vs.

BENJAMIN F. BOWERMAN & Ano'r.

It appearing to this court that during the pendency of this suit the claim of the plaintiffs therein has been assigned to William C. Rogers and Francis C. Welch, citizens of the State of Massachusetts, and on motion of Edmund Coffin, Jr., defendants' attorney (Messrs. McDaniel, Wheeler & Souther, attorneys for the plaintiffs and said assignees, consenting thereto), it is ordered that the said William C. Rogers and Francis C. Welch, as assignees of said Benjamin F. Burgess and Walter Burgess, the plaintiffs herein, be substituted in this action as plaintifis in the place and stead of said Benjamin F. Burgess and Walter Burgess, according to the provisions of sec. 756 of the code of civil procedure, and that this order be entered
34 as of the 16th day of January, 1884.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court. Benjamin F. Burgess *et al.* against Benjamin F. Bowerman *et al.* Order substituting assignees as pl'ffs. Edmund Coffin, Jr., attorney for def'ts. Office and post-office address, Nos. 4 and 6 Pine street, New York city. U. S. circuit court. Filed Mar. 8, 1884. Timothy Griffith, clerk.

35 *Judgment. Sept. 9th*, 1884.

Circuit Court of the United States for the Southern District of New York.

WILLIAM C. ROGERS and FRANCIS C. WELCH, as Assignees of Benjamin F. Burgess and Walter Burgess,

vs.

BENJAMIN F. BOWERMAN and HENRY A. BOWERMAN.

1884, Jan'y 16, verdict of jury	$6,105 77
Interest thereon to the above date	237 17
	$6,342 94

This cause being at issue and regularly placed upon the calendar of this court and regularly noticed for trial by both parties, and the issues having been tried before the Hon. William J. Wallace, circuit judge, and a jury at a stated term held at the United States court-house, in the city of New York, on the 16th day of January, 1884, and the jury having rendered a verdict in favor of the then plaintiffs, Benjamin F. Burgess and Walter Burgess, and against the defendants for six thousand one hundred and five $\frac{77}{100}$ dollars, and the defendants having thereupon moved for a new trial of the said action before the same judge, who denied the same, and an order having been entered and filed the 8th day of March, 1884,

36 substituting the said William C. Rogers and Francis C. Welch, assignees of said Benjamin F. Burgess and Walter Burgess, as plaintiffs herein, in their place and stead, and their costs having been duly taxed on notice at the sum of eighty-eight dollars and fifty-one cents:

Now, on motion of Wheeler & Souther, attorneys for the plaintiffs, it is ordered, adjudged, and decreed that said plaintiffs, William C. Rogers and Francis C. Welch, as assignees of Benjamin F. Burgess and Walter Burgess, have judgment in their favor against the defendants, Benjamin F. Bowerman and Henry A. Bowerman, and of them do recover the sum of six thousand three hundred and forty-two dollars and ninety-four cents, being the amount of said verdict, with legal interest thereon from the date thereof to this date, together with the sum of eighty-eight dollars and forty-one cents costs, taxed as aforesaid, amounting in the aggregate to the sum of six thousand four hundred and thirty-one dollars and thirty-five cents, and that said plaintiffs have execution therefor.

Judgment signed this 10th day of September, A. D. 1884.

TIMOTHY GRIFFITH, *Clerk.*

[On margin:]

	$6,105 77
	237 17
	89 41
	$6,431 35

37 (Endorsed:) Circuit court of the United States for the southern district of N. Y. William C. Rogers and Francis

C. Welch, as assignees, &c., against Benjamin F. Bowerman and Henry A. Bowerman. Judgment. Wheeler & Souther, attorneys for plaintiffs, 120 Broadway, New York. Verdict, $6,105.77; interest thereon, $237.17; costs, $88.41—$6,431.35. U. S. circuit court. Filed Sep. 10, 1884, 2.30 p. m. Timothy Griffith, clerk.

38 *Bill of Exceptions.*

Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

BENJAMIN F. BURGESS and WALTER BURGESS, Plaintiffs,

against

BENJAMIN F. BOWERMAN and HENRY A. BOWERMAN, Defendants.

Afterwards, to wit, on January 16, 1884, at a stated term of this court, begun and held at the city of New York, before the Hon. William J. Wallace, circuit judge of the United States, appointed to hold said circuit — according to the form of the statute in such case made and provided, the aforesaid issues, so joined as between said parties as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said plaintiffs being represented by Everett P. Wheeler, Esq., their counsel, and the defendants by Edmund Coffin, Jr., their counsel.

And in the course of the trial the defendants' counsel did take and allege sundry exceptions to the rulings of the court in the ad-
39 mission of certain evidence offered by and on behalf of the plaintiffs and in refusing to dismiss the complaint of the plaintiffs and to direct a verdict in favor of the defendants and in directing a verdict in favor of the plaintiffs; all of which exceptions are hereinafter particularly shown.

The plaintiffs, to sustain the issues on their part, read the exhibits, of which copies are annexed to the complaint, and which the defendants admitted to be extracts from correspondence that passed between the defendants and the firm of Benjamin Burgess & Sons, which exhibits are as follows:

Plaintiffs to Defendants. Exhibit 1.

JANUARY 27, 1881.

We notice the tests and have seen the sample. They are certainly very beautiful sugars for their class. Now, we feel anxious as to the duties on the dry test, but if they should be decided against us we must protest as soon as duties are paid and place the matter in the hands of a first-class lawyer, the one employed by Messrs. Knowlton, perhaps, unless you know of a better, to commence the suit as soon as possible, but we hope all this will not be necessary.

We suppose you will take proper care of them on the wharf. How long can they remain on the wharf? Of course we wish them insured.

If the sugars are marked up on dry test it is necessary to formally protest against the decision of the collector and then appeal to the Secretary of the Treasury. This is the first step, and when the duties are paid to enter suit.

Defendants to Plaintiffs. Exhibit 2.

JANUARY 28, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received and contents noted, all of which will be duly attended to.

Plaintiffs to Defendants. Exhibit 3.

FEBRUARY 9, 1881.

We are in receipt of yours of yesterday and note the Government test of our sugars per Santiago. Of course, you will duly protest against the marking up of the dry test, and we hope the Government will have to pay it back some time.

Defendants to Plaintiffs. Exhibit 4.

FEBRUARY 17, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have your favor of yesterday. There is no change in our sugar market; business is still sluggish. We are delivering the "Tuinica," having paid duties on invoice. When the entry is liquidated will duly protest against the polariscope when above color classification.

Plaintiffs to Defendants. Exhibit 5.

41 FEBRUARY 28, 1881.

We suppose it is now time to make a formal protest as to the marking up on dry test.

Defendants to Plaintiffs. Exhibit 6.

MARCH 1, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received. We went to the custom-house to-day to get liquidation of duties on "Angelita" and "Tuinica," but it was not ready; as soon as it is, will make formal protest.

Defendants to Plaintiffs. Exhibit 7.

MARCH 4, 1881.

We have just got liquidation of the centrifugals (a copy of which we send you), and shall enter protest and appeal to-morrow.

Plaintiffs to Defendants. Exhibit 8.

MARCH 5, 1881.

Of course you protest against the marking up on dry test in the Tuinica as well as the Angelita.

Defendants to Plaintiffs. Exhibit 9.

MARCH 5, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have lodged protest and appeal against
42 additional duties levied on centrifugals *ex* Santiago on polariscope test with collector of the port.

Plaintiffs to Defendants. Exhibit 10.

MARCH 31, 1881.

Of course you will duly appeal from the Government assessing duties by tests.

Plaintiffs to Defendants. Exhibit 11.

APRIL 16, 1881.

We are in receipt of your favor of yesterday enclosing the reply of the Secretary of the Treasury to your appeal of March 5 regarding sugars *ex* Santiago, Jan. 25. We would await the decision in the Welch suit before commencing proceedings, if there is time.

Please keep us posted in the sugar case.

Defendants to Plaintiffs. Exhibit 12.

APRIL 15, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have your favor of yesterday and enclose herewith the Secretary of the Treasury's reply to our appeal of March 5th (sugars per "Santiago," Jan. 25, '81). The collector's decision is affirmed. We suppose you will wait the decision in the Welch suit before commencing proceedings.

Please advise us.

43 *Defendants to Plaintiffs. Exhibit* 13.

APRIL 27, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received. The Kioto sugars are about half out of ship and we send you to-night by express samples and tests of each mark. Our market is quiet but strong. We hear that the Government has decided to appeal from the decision (in New York) in the Welch case. Sales reported as below.

Defendants to Plaintiffs. Exhibit 14.

JUNE 18, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We presume you have in mind the Santiago's cargo—centrifugal, Angelita—which arrived here July 6th, 1880, the most of which was raised on polariscope test, one-fourth cent and 25 per cent. above the legitimate rate of entry on Dutch standard, and will commence suit against the Government in due season.

Plaintiffs to Defendants. Exhibit No. 15.

JUNE 20, 1881.

We have your favor of the 18th, in which you say, "We presume you have in mind the Santiago's cargo—centrifugal, Angelita—which arrived July 6, '80, the most of which was raised on polari-
44 scope test, one-fourth — and 25 per cent. above the legitimate rate of duty on Dutch standard, and will commence suit against the Government in due season."

The cargo you refer to did not pay at all, as we understand duty above the Dutch standard, it having just escaped on dry test.

Of course we must not let any of our cases escape due attention. We attend here to all our Boston cases and enter suits as fast as they come around, and we suppose you can do the same as our agents in New York. Are we right? Please look into every case and keep us timely informed and whether there is anything for us to do personally or by power.

The plaintiffs then called Walter Burgess, who being duly sworn, testified that he resided in the city of Boston, Massachusetts, where he had been in the business of sugar commission as a member of the firm of Benjamin Burgess & Sons for five or six years; that the defendants, Bowerman Bros., had been engaged in business together with Benjamin Burgess & Sons for more than ten years, the general course of which was that Burgess & Sons had sugar consigned to them which they had had sent to Bowerman Bros. to take care of, paying all expenses on them, and finally to sell and remit to Burgess & Sons the proceeds after deducting expenses and commissions; that Bowerman Bros. paid the expenses on the different importations, excepting sometimes in cases of duties and freight, which Burgess & Sons generally paid; that the remittances
45 from Burgess & Sons to Bowerman Bros. were generally in round sums to cover an approximate amount. The other expenses, except the freight, the plaintiffs knew nothing of until they received the account of sales from Bowerman Brothers. The items in Exhibits A and C of payments to J. A. Dreyfuss for services were paid by Bowerman Brothers to Dreyfuss for testing sugars by the polariscope test. In the case of the sugars by the City of Santiago, the account of which is contained in Exhibit B, annexed to the answer, the plaintiffs made no remittances for duties. In the case of the importation by the David Bugbee shown in the account cur-

rent, Exhibit D, the plaintiffs remitted on account of the duties the sum of $18,000. The total duties on that importation were $26,893.21. This the defendants deducted from the proceeds of the sugars. In the case of the second importation by the Santiago the plaintiffs made no remittances for duties; that during the period covered by this controversy, say down to November 1st, 1881, Bowerman Bros. had other sugars of Burgess & Sons in their hands worth about $150,000, and no interest was allowed either upon remittances or sales in the accounts of their transactions. The usual time of credit on sales of sugar is ten days, and during this period the defendants usually had a balance in their hands to the credit of the plaintiffs. Between 8th March, 1881, and 16th June, 1881, a conversation was had between Burgess & Sons and Mr. Bowerman, in which Burgess & Sons insisted that the commission of the
46 defendants as brokers should be in New York only ½ of one per cent., because that was the rate in Boston. Burgess & Sons told Bowerman Brothers that their correspondents who sent them sugars objected to the charge of one-half of one per cent., and Mr. Bowerman insisted that the commission should be higher in New York because they had to attend to the custom-house business and insuring the cargoes and doing other things which a broker in Boston did not have to attend to. Still we told Mr. Bowerman that our correspondents did not wish sugars to come to New York if they had to pay any greater charge to the brokers in New York than they did to the brokers in Boston, and Messrs. Bowerman Brothers said that in view of the probability of our sending them a large lot of sugar that year and afterwards they would reduce their commission to a quarter of one per cent., although it should cover the same work as before, and they would go on with the business just as they had been doing before for a quarter of one per cent., the brokerage formerly charged. After that Burgess & Sons sent the defendants the sugars spoken of in the conversation and advised their friends to send sugars to New York, and they were so sent. One large lot of Manilla sugars was sent the defendants which amounted to about $80,000. After the receipt of the letter of June 20th (Exhibit 15) Burgess & Sons never received from the defendants any request to take any personal action in the premises or to send them any power of attorney for the purpose or to attend to the matter instead of the defendants.

The witness was then asked this question:

Q. State whether or not there was any reliance by your the omission on the part of the defendants to make any quest for your personal attention; and, if so, what.

Counsel for the defendants objected on the ground that the witness should only be allowed to state what they did or what they did not do.

The COURT: I think it is competent for the witness to say that they assumed that the defendants had commenced a suit.

Counsel for the defendants excepted.

Answer. We fully relied upon the defendants to attend to the matter.

The witness then testified that in the letters which had been read in evidence the words "Tuinica" and "Angelita" were names of Cuban plantations where the sugars were manufactured, the word "centrifugal" referred to a quality of sugars, being the sugars imported by the Santiago, and "dry test" to the polariscope test; that the following letter is signed in defendants' handwriting, and was received by Burgess & Sons from the defendants in the spring of 1882, and was the first intimation Burgess & Sons had that suits had not been brought.

It was admitted that the pencil marks on this exhibit were in the handwriting of F. D. Winslow, one of the officers of the custom-house of this port who had charge of the protest and appeal.

48 The letter was read in evidence as Exhibit 16 and is as follows:

Hon. W. H. Robertson, collector of the port.

SIR: We respectfully request the reliquidation of the following entries on which protest and appeal have been duly filed in your office:

Str. Santiago, Jan'y 25, '81; bond 1276. Protest and appeal filed March 5, '81.

Ex David Bugbee, March 17, '81. Protest and appeal filed April 26, '81.

Ex Santiago, Sept. 6, '81. Protest and appeal filed Oct. 19, '81.

Respectfully, BOWERMAN BROS.

(In pencil:) Suit not having been brought within 90 days from the date of the Secretary's decision upon the above-mentioned appeals, the appellants are not entitled to refund under sec. 2931, R. S. F. D. W.

Cross-examined by the counsel for defendants, he testified:

49 There were altogether a large number of importations sent here to New York in which Messrs. Bowerman Bros. acted as brokers and in which we were interested. I do not remember just the amount. The defendants never commenced suit on any one of them. We knew they were not lawyers, but brokers for the sale of sugar and molasses. We received this answer to the letter of June 20th:

Letter offered in evidence—Defendants' Exhibit No. 17—as follows:

NEW YORK, *June 21st*, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We have received your favor of yesterday. You are right about the duties on cargo sugar *ex* "Santiago," July 6, 1880. We had it down "Paid under protest" by mistake. We enclose you Woodruff & McLean's storage bill on "Bugbee's" cargo, which is

less than usual rates by agreement. Our market is quiet, but firm for good sugars, with sales as below.

Yours truly,

(Signed) BOWERMAN BROS.

P. S.—Since writing the above we discovered an overcharge of a half-month's storage for a few days. They kept the sugars to accommodate the buyers and have collected W. & McL.'s check for same—$64.60—which we enclose. It seems that mistakes, like misfortunes, never come singly.

(Signed) B. BROS.

Defendants read the letter Plaintiffs' Exhibit No. 2 in full as follows:

50 NEW YORK, *January* 28, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: Your favor of yesterday is received and contents noted, all of which will be duly attended to. Your sugars are insured. As to the time they can remain on the wharf, it depends somewhat on the warehouseman's necessities for wharf room; will keep them there as long as possible. Do you wish us to offer them before we get classification and dry test? Sales reported to-day will be noted below.

Yours truly,

(Signed) BOWERMAN BROS.

Witness continued: I think we had no further correspondence with the defendants in regard to the duties on any of these importations, unless we may have referred to them near the time when they wrote us they had not brought suit and sent us Exhibit No. 16. It may have been sent in answer to some letter from us; letters passed between them and us almost daily throughout 1881. The accounts annexed to the answer were received by us in due course, in accordance with their habit. They sent us notice that the Secretary of the Treasury had affirmed the decision of the collector on the first shipment by the steamship Santiago. I don't think they informed us in so many words that the Secretary had done so in the case of all these shipments; they wrote in the other cases that they were not right on the test.

51 On redirect examination witness identified the following letter as received by his firm from the defendants.

Read as Exhibit 17, as follows:

Bowerman Brothers, 104 Wall St.

NEW YORK, *June* 21, 1881.

Messrs. Benj. Burgess & Sons, Boston.

GENTLEMEN: We received your favor of yesterday. You are right about the duties on cargo sugar *ex* "Santiago" July 6, '80. We had it down "paid under protest" by mistake.

We enclose you Woodruff & McLean's storage bill on "Bugbee's" cargo, which is less than usual rates, by agreement.

Our market is quiet, but firm, for good sugars, with sales as below.

Yours truly, BOWERMAN BROTHERS.

P. S.—Since writing the above we discovered an overcharge on a half month's storage for a few days they kept the sugars to accommodate the buyers, and have collected W. & McL. check for same, $64.60, which we enclose. It seems that mistakes, like misfortunes, never come singly.

B. BROS.

660 hhds. Cuba ---------- Test 90.02 at 8
113 hhds. " ---------- Test 89.2 at 7⅞
41 hhds. Jamaica ---------- Test 88.0 at 7¾

52 It was admitted by the defendants that the protests referred to in the pleadings, in reference to the three importations referred to in the complaint, were signed by or in behalf of the defendants, in their own name, but intending to act as agents for the plaintiffs.

The plaintiffs then rested, and counsel for the defendant moved to dismiss the complaint on two grounds:

First. That there is no proof that the firm of Burgess & Sons owned these sugars. The proof is to the contrary—that they received them from somebody else and it was not their sugar; that the rebate of duty, if recovered, would belong to the owners of the sugars, and the cause of action, if there be any, against the defendants, belongs to the owners of the sugars.

Second. That there is no proof of any agreement on the part of these defendants to commence any action whatsoever, nor any proof that they were in any way employed to commence any lawsuit.

The motion was denied and the counsel for the defendants excepted.

The witness was then recalled by the plaintiffs for the purpose of meeting the first point of the defendants' motion to dismiss, and testified that the firm of Burgess & Sons were interested in the sugars; every cent was to come to them. These sugars came to Bowerman Bros. They were consigned to Burgess & Sons for Messrs. Bowerman Bros. They were not in their name for their con-

53 venience. The papers were originally to come to Burgess & Sons. They were consigned to Burgess & Sons and placed in the name of Bowerman Bros. for convenience of entry in New York. There was no formal agreement in writing, but Burgess & Sons had correspondence with Campos & Co. by which Burgess & Sons were interested in the sugars, half of which was theirs by purchase and the other half because they had advanced on them before out there in Cuba. Burgess & Sons were the actual owners of half and had more than fully advanced on the other half. The goods were consigned to cover those advances.

On cross-examination he testified: The consignment was made by bill of lading and invoice in the regular way. I have not these papers here.

The defendants' counsel then moved to strike out this evidence as to ownership and consignment, because the agreement was in writing and parol testimony could not be received in regard to the facts.

The COURT: I think it is competent. I do not know that it is necessary to produce all the correspondence between the parties to show just how the title and interest accrued.

The counsel for the defendants excepted.

The witness then identified certain letters as sent by the defendants to his firm, which were offered in evidence, as follows:

DEFENDANTS' EXHIBIT 2.

BOSTON, *May 22nd*, 1882.

54 Messrs. Bowerman Bros., New York.

DEAR SIRS: Your favor of the 20th is at hand, and we note what you write in reference to our claims and that you expected to talk with Mr. Manning about them. We do not see what he could do for you on legal grounds, and it seems to us that the only course for you to pursue is to petition the Government to waive the circumstance of the suit not having been duly entered, especially as the omission was no fault of ours.

Of course the owners of the cargoes illegally marked up in duty must be paid the amount of the excess, which amount we shall have to collect of you; but we certainly hope that you may be able to succeed in getting it from the Government.

We hear of no sales here to-day.

Yours truly, BENJ. BURGESS & SONS.

There have since been sold 500 hhds. Musco sugar, 90 —, at 7½ cents.

DEFENDANTS' EXHIBIT 3.

BOSTON, *May 24th*, 1882.

Messrs. Bowerman Bros., New York.

DEAR SIRS: We are in receipt of your favor of yesterday and note contents.

We would sell the "Morrisons'" sugars, 190 bags, at 8½
55 cents, if the duty on them should not be much over 2 cents.

In explanation of our former letter and in reply to the inquiries in yours of yesterday we would say that we do not see why you are not responsible to us for the amount of duties illegally assessed on the invoices referred to, in case they they are not refunded by the Government. We advised and directed you long ago to take all necessary steps to secure and preserve our rights, and if we fail it will be solely in consequence of your not having attended to the matter and procured proper advice. We shall be obliged to allow

the amounts to our consignees, and the loss should not fall on us, as we took all means to advise you what was necessary to do in the matter. We supposed that you made a protest in each case and took appeals from the secretary's decision.

We should, however, add that we think you had better at once present the claim to the proper officer at the custom-house in New York and have a proper certificate made out and forwarded to Washington, as in other cases where suit had been brought. We desire that everything possible should be done to save our rights, and we desire to give you all — assistance we can.

Yours truly,

(Signed) BENJ. BURGESS & SONS.

DEFENDANTS' EXHIBIT 4.

BOSTON, *May* 27, 1882.

Messrs. Bowerman Bros., New York.

DEAR SIRS: We duly received your favors of yesterday and
56 the day before and noted contents. We did not write yesterday, the writer having to go away early. We suppose our sugars by the "John T. Ives" and "Edwin I. Morrison" are insured. Please send us the duties as soon as you know them. We hope you can soon send us good offers for them.

Have you done anything in your custom-house about the claims against the Government? If at your custom-house they have not sent or will not send on to Washington a certificate of those claims we think we shall make application to the Secretary of the Treasury and so learn if the Government will make the refund or not; but we wish to hear from you first, so as not to conflict with any course you might be pursuing.

We hear of no sales reported to-day.

Yours truly, BENJ. BURGESS & SONS.

The plaintiffs then rested.

The defendants then called JAMES F. CATHWELL, who, being duly sworn, testified that he had been engaged in business as a sugar broker in New York for 30 years and was familiar with the duties of such a broker.

Q. What are the duties of a sugar broker in the city of New York who receives a consignment of sugar for sale?

Counsel for the plaintiffs objected that the questionwas irrelevant.

57 The court held that it was not necessary to show such duties, as it was admitted that the claim was not for any failure to perform such duties.

The defendants then offered in evidence the invoices upon which the consignments in question were received and the letters of instruction accompanying them as follows:

DEFENDANTS' EXHIBIT No. 5.

Invoice of sugar shipped on board the Am. steamer "Santiago," Phillips, master, bound for New York, via Santiago de Cuba, for ac. risk of the undersigned and consigned to order.

Marks.	Hhds.	Tcs.	Bbls.			
Angelita,	493	--	34	centrifugal sugar,	877,007 lbs. gross.	
				Tare, 12%,	105,241 "	
					771,766 lbs. net @ 11¾, r. s., f. o. b..	45,341 25
Tuinica,	100	--	do.	centrifugal sugar,	175,355 lbs. gross.	
				Tare, 12%,	21,043 "	
					154,312 lbs. net @ 11, r. s., f. o. b..	8,487 16
do.	B 1-28	28	--	do. centrifugal sugar,	50,591 lbs. gross.	
				Tare, 12%,	6,071 "	
					44,520 lbs. net @ 10¾, r. s., f. o. b..	2,392 95
	621-34				970,598 lbs. net.	$56,221 36
Consul's certificate						2 75
						56,224 11

E. E.
(No. 8. Original.)
Cienfuegos, January 17, 1881.
(Sig'd) pp. CAMPO & Co.
F. SCHNIEP.

58 CIENFUEGOS, *January* 17, 1881.

Messrs. Bowerman Bros., New York.

DEAR SIRS: By order of the mutual friends, Messrs. Benj. Burgess & Sons, Boston, we have shipped on board the steamer "Santiago," which will sail this afternoon for your port, via Santiago de Cuba, 621 hhds. and 34 barrels centrifugal sugar, mark- "Angelita" and "Tuinica," amounting to $56,224.11, to your consignment, and the said friends in Boston will give you their instructions with regard to the sale.

The captain will hand you a package of samples of these sugars; also another one, which you will remit to the already-mentioned friends. By these samples you will observe the quality of the sugars, and that the 28 hhds., "Tuinica," countermarked B, are inferior in quality to the other 100 of same mark.

Wishing this steamer a happy voyage and that the cargo may arrive in good condition,

We remain, etc., etc.,

(Signed) CAMPO, PLANA & CO.

DEFENDANTS' — No. 6.

Invoice of sugar shipped on board the Amer. st'r "Santiago," Phillips, master, bound for New York, via Santiago de Cuba, for account and risk of the undersigned and consigned to order.

Marks.	Hhds.	Tcs.			
Andreita,	603	centr. sugar,	1,026,951 lbs. gross.		
		Tare, 12%,	123,234 "		
			903,717 lbs. nett @ 11½, r. t. @ f. o. b.		$51,963 73
" M,	300	molasses do.,	552,667		
		Tare, 12%	66,320		
			486,347 lbs. nett @ 9½, r. t. @ f. o. b.		23,101 48
			1,390,064 lbs. net.		75,065 21
Consul's certificate					2 75
					75,067 96

E. E.
Cienfuegos, August 29, 1881.

pp. CAMPO & CO.
F. SCHNIEP.

59 SAGUA LA GRANDE, *March* 10, 1881.

Messrs. Bowerman Bros., New York.

GENTLEMEN: By instructions of Messrs. Campo & Co., of Cienfuegos, we herewith beg to enclose copy of C. P. B. L. and certified invoice 646 hhds. of centrifugal sugar, shipped by their order and account on board the brig "David Bugbee."

Please acknowledge receipt and oblige—

We beg to remain very truly yours,

RODRIGUEZ Y HNO.

DEFENDANTS' EXHIBIT No. 7.

Invoice of 646 hhds. of centrifugal sugar shipped by Rodriguez y Hno by order of Messrs. Campo & Co., of Cienfuegos, on board the brig "David Bugbee," Stowers, m'r, bound for New York, for account and risk of whom it may concern and consigned to order.

M, $\frac{1}{150}$,	150 hhds.,	252,635
A, $\frac{1}{183}$,	191 "	314,238
F. G., $\frac{1}{333}$,	127 "	206,310
F, $\frac{1}{137}$,	138 "	237,160
T., $\frac{1}{312}$,	40 "	67,725
646 hhds.		1,078,068 = 948,699 lbs. n. @ 10½, r. s. sp. gold, f. o. b., $49,806.70

E. & O. E.
Sagua La Grande, 4 March, 1881.

RODRIGUEZ Y HNO.

60 CIENFUEGOS, *August* 29, 1881.

Messrs. Bowerman Bros., New York.

DEAR SIRS: We herewith hand you invoice and bill of lading of 603 hhds. centrifugal sugars and 300 hhds. molasses sugars, mark "Andreita," which we have shipped to your consignment by order

of Messrs. Benj. Burgess & Sons, Boston, on board steamer "Santiago," the purser of which steamer has two packages of samples of these sugars, one for yourselves and one which you will kindly send to the Boston friends, who will also give you instructions with regard to the sale of this shipment; and

We remain, etc., etc.,
(Signed) CAMPO, PLANA & CO.

The defendants then called William D. Bowerman, who, being duly sworn, testified that he was one of the firm of Bowerman Bros., and that these were the invoices upon which these consignments were received, and that these letters accompanied them; that his firm had never brought any suits as brokers for any importers of sugars; that in regard to suits for recovery of duties mentioned in the correspondence in evidence the understanding of the defendants was that they had no right to commence a lawsuit; it was not their business, and they were not expected to do it; it was not part of their business; the usual brokers' commission in the city of
61 New York for similar business to that they performed in regard to these invoices at that time was one-half of one per cent., and in a good many instances .one per cent. when they entered the goods, paid the duties delivered, and collected the bills; that in the accounts they rendered to Burgess & Sons they charged one-half per cent. and then credited back one-half the commission to keep up the rate of commission.

Letter from Burgess & Sons to Bowerman Bros. offered in evidence and read as follows:

DEFENDANTS' EXHIBIT 11.

BOSTON, *September* 19, 1881.

Messrs. Bowerman Bros., New York.

DEAR SIRS: We have your favor of Saturday, with custom-house report of test of the "Andreita" 603 hhds. centrifugals. Please appeal from the decision on the 13 hhds. 7 tes., and when you pay the duties make the formal protest. We think the protest should be made within ten days from date of liquidation.

Now, we must beg you to send us the custom-house weights of the above sugars and also of the 300 molasses.

We — afraid your market will be rather dull this week. Perhaps we may as well sell the Qoito sugars at 65 Sc., and when you can send us reasonable offers for all the other sugars please do so, preferring, of course, to hold the longest the Rosano; 600 hhds. centrifugal sugars were sold in your market on Saturday to come here.

Yours most truly,
(Signed) BENJ. BURGESS & SONS.

62 That they received no instructions whatever in regard to commencing suit after 20th June.

It was admitted that the time within which to commence suit on the first importation by the Santiago was 90 days after 13th April, 1881; on the importation by the Bugbee, 90 days after 27th May, 1881, and on the second importation by the Santiago. 90 days after 2nd November, 1881.

The defendants offered in evidence a letter from Burgess & Sons, dated 22nd March, 1882, as follows:

DEFENDANTS' EXHIBIT 12.

BOSTON, *March* 12, 1882.

Messrs. Bowerman Bros., New York.

DEAR SIRS: We have your favor of yesterday enclosing copy of the liquidation of duties on our invoice *ex* "Santiago," voyage before the last. Please find enclosed check to your order for $615.68, which, with the two amounts of refunds for the custom-house, make the amount of freight per "Santiago" present.

We wish you to hand in to your collector a statement of our claims of the illegal duties. The amounts will be the actual amounts of such alleged duties, with interest at 6 per cent. per annum from date of payment to the date of the payment back to us. As you did not enter suits, there are no costs for the Government to pay on that score. The amount of the interest money cannot be stated, not knowing the date at which the Government will refund, but simply
63 add to the statement "with interest at 6 per cent. from the date of payment to date of refund." We will hand in this a statement, but you will have to give the custom-house the number of the bond and manifest, if you have it, which you probably have. Our importers are handing in their statements to the collector here.

To-morrow we shall expect samples, test, and valuation of our sugars *ex* "Santiago."

Our sugars and molasses markets are quiet to-day, but very firm. We hear that Mataurus molasses has been sold to-day in your market at 28c.; C. & F. basis, 50c.

We remain very truly yours,

(Signed) BENJ. BURGESS & SONS.

The defendants' counsel renewed his motion to dismiss the complaint and asked that a verdict be directed in favor of the defendants on the same grounds before stated.

Motion was denied.

Defendants' counsel excepted.

The court thereupon directed a verdict for the plaintiffs for the sum of $6,105.77, and the jury so found.

And inasmuch as the foregoing several matters of law and of fact and the several exceptions taken and made do not appear upon the record of the trial, therefore, in the prayer of the defendants, by their counsel, *and* the said judge has signed the foregoing as and for the bill of exceptions in this cause as of the 16th day of January, A. D. 1884.

WM. J. WALLACE.

64 (Endorsed:) U. S. circuit court, S. D. of New York. Benjamin F. Burgess *et al.*, pl'ffs, against Benjamin F. Bowerman *et al.*, def'ts. Case. Edmund Coffin, Jr., attorney for defendants. Office and post-office address, Nos. 4 and 6 Pine street, New York city. Motion for new trial is denied. July 23, 1884. Wm. J. Wallace. U. S. circuit court. Filed July 26, 1884. Timothy Griffith, clerk.

65 Know all men by these presents that Henry A. Bowerman, William E. Howell, and William F. Havemeyer are held and firmly bound unto William C. Rogers and Francis C. Welch, as assignees of Benjamin F. Burgess and Walter Burgess, in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said obligees and their executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the seventeenth day of September, in the year one thousand eight hundred and eighty-four.

The condition of this obligation is such that if Benjamin F. Bowerman and Henry A. Bowerman, who have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the southern district of New York in favor of the obligees herein against said Benjamin F. Bowerman and Henry A. Bowerman for the sum of $6,431.35, shall prosecute their said writ of error to effect and shall answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force.

HENRY A. BOWERMAN. [SEAL.]
WM. E. HOWELL. [SEAL.]
W. F. HAVEMEYER. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN S. DERBY.

66 STATE OF NEW YORK, } *ss:*
County of New York, }

On this seventeenth day of September, in the year one thousand eight hundred and eighty-four, before me personally came Henry A. Bowerman, William E. Howell, and William F. Havemeyer, to me known, and known to me to be the individuals described in and who executed the foregoing instrument, and they thereupon severally duly acknowledged to me that they had executed the same.

[SEAL.] JOHN S. DERBY,
Notary Public, N. Y. City & County.

CITY AND COUNTY OF NEW YORK, *ss:*

William E. Howell and William F. Havemeyer, being duly sworn, say, each for himself, that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

W. E. HOWELL.
W. F. HAVEMEYER.

Sworn to before me this 17th day of September, 1884.
[SEAL.] JOHN S. DERBY.

(Endorsed:) U. S. Supreme Court. Benj. F. Bowerman *et al.*, pl'ffs in error, *v.* Wm. C. Rogers *et al.*, def'ts in error. Bond. Dated Sept. 17, 1884. Approved as to form & sufficiency of sureties. Wm. J. Wallace, judge U. S. circuit c't. U. S. circuit court. Filed Sep. 18, 1884. Timothy Griffith, clerk.

67 UNITED STATES OF AMERICA, *ss:*

To William C. Rogers and Francis C. Welch (assignees of Benjamin F. Burgess and Walter Burgess), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Benjamin F. Bowerman and Henry A. Bowerman are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated Sept. 17, 1884.

WM. J. WALLACE.

68 [Endorsed:] U. S. Supreme Court. Benj. F. Bowerman & *al.*, plaintiffs in error, against William C. Burgess & *al.*, defendants in error. Citation. Service hereof admitted Sept. 18, 1884. Wheeler & Souther, att'y- for def'ts in error.

[Stamped:] U. S. circuit court. Filed Sep. 9, 1884. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 187. Benjamin F. Bowerman and Henry A. Bowerman, plaintiffs in error, *vs.* William C. Rogers and Francis C. Welch, assignees of Benjamin F. Burgess and Walter Burgess. Filed 24th November, 1884.

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 187.

BOWERMAN BROS.

AGAINST

WM. C. RODGERS ET AL.

Brief for pltfs. in error.

Statement.

The complaint in this action substantially sets forth that the plaintiffs in error (Bowerman Bros., defendants below) were the agents of Benj. Burgess & Sons, of Boston (whose assignees the defts. in error are) to do all that was necessary at the Custom House in New York *relating to the entry of*, and *the ascertainment and liquidation of duty* upon, certain sugars brought into that port, at a time when it was a subject of controversy between the importers and the custom-house officials whether or not the latter had the right to apply the polariscopic test to such sugars, in determining the duty to be paid thereon; (104 U. S., 694.) that the collector at New York asserted and Bowerman Bros. (for the importers) denied the right to apply this test to these sugars, the use of it increasing the duty a half cent upon every pound; that the collector applied the test and exacted the increased rate of duty, against which exaction protest was duly and seasonably made, and appeal taken to the Secy. of the Treasury, who sustained

the collector's action in the premises (Rec., pp. 3 and 4.)

"The said protest and appeal were made and taken by the (original) defendants *in obedience to the instructions of these plaintiffs* [Benj. Burgess & Sons] and *in accordance with their own written agreement*, which instructions and which written agreement are *contained in the correspondence* between the [original] plaintiffs and defendants, and of the material portions of which copies are hereunto annexed, marked Exhibits 1 to 15 inclusive." (Rec. pp. 4–5 ; fol. 8.)

The third paragraph of the complaint, stating the gravamen of the charge against Bowerman Bros., specifying what they did not do, which it is claimed they should have done, is reproduced in full :

Third. *Thereupon* it became and was the duty of the defendants *as such agents*, within ninety days after the said decision of the Secretary of the Treasury, *to bring suit* against such collector for the recovery of the difference in the amount between the duties so paid by them on behalf of these plaintiffs as aforesaid and the amount of the duties claimed by them to be properly payable upon said sugars, to wit, one quarter of a cent per pound plus twenty-five percentum, amounting in the aggregate to two thousand four hundred and forty $\frac{76}{100}$ dollars ; but the said defendants, disregarding the said *written instructions* of the plaintiffs and the *written agreement* made by them *as aforesaid, all of which are contained in the said exhibits*, neglected to bring such suit, and therefore, pursuant to the provisions of the Revised Statutes of the United States, no suit could be maintained in any court for the recovery of the duties so exacted as aforesaid. *They made no response to the letter, Exhibit 15, in respect to the matters therein referred to*, and the plaintiffs relied upon their bringing suits in New York, pursuant to the instructions therein contained, and consequently did not instruct any one else to bring such suits on behalf of the plaintiffs, which these plaintiffs would have done had the defendants notified them that they declined to follow the said instructions, which notification the defendants did not give to the plaintiffs. (Rec., p. 5.)

The next paragraph (*Ib.*) states the determination of this Court in Merritt vs. Welsh, 104 U. S., 694, and the consequent refund of excess of duties to those importers who had seasonably protested, appealed and brought suit; and that refund was refused the plaintiffs because of failure to sue, whereby they lost that amount.

Mutato nomine, there were two other similar causes of action stated, arising upon later importations. (*Id.*, pp. 6–11.)

Of the fifteen attached exhibits, the first fourteen relate to the entry, care, wharfage, protest and appeal upon the importations, and the conduct of the government in applying the polariscopic test to sugars, etc., etc. (Rec., pp. 11 to 14.)

Exhibit 15, being that upon which the original plaintiffs substantially relied, in their declaration and upon the trial, is given in full :

June 20, 1881.

We have your favor of the 18th in which you say, "We presume you have in mind the Santiago's cargo centrifugal Angelita, which arrived July 6, '80, the most of which was raised on polariscope test one-fourth and 25 per cent. above the legitimate rate of duty on Dutch standard, and will commence suit against the Government in due season."

The cargo you refer to did not pay at all, as we understand, duty above the Dutch standard, it having just escaped on dry test.

Of course, we must not let any of our cases escape due attention.

We attend here to all our Boston cases, and enter suits as fast as they come around, and we suppose you can do the same as our agents in New York. Are we right? Please look into every case and keep us timely informed, and whether there is anything for us to do personally or by power. (Rec., 14 and 27.)

Though the declaration states (*ante*, p. 2), that Bowerman Bros. did not respond to this letter, "in respect to

the matters therein referred to," it appeared upon the trial that they did send this reply upon the following day :

NEW YORK, June 21, 1881.

Messrs. BENJ. BURGESS & SONS,
Boston.

Gentlemen : We received your favor of yesterday. You are right about the duties on cargo sugar *ex* Santiago, July 6, '80. We had it down "paid under protest," by mistake.

We enclose you Woodruff & McLean's storage bill on "Bugbee's" cargo, which is less than usual rates by agreement.

Our market is quiet, but firm, for good sugars, with sales as below.

Yours truly,
BOWERMAN BROS.

(Rec., pp. 29, 30, 31.)

The answer set up, in substance, that the original defts. were sugar-brokers, negotiating sales of other people's sugar, collecting proceeds, paying charges (duties, freights, storage, and other incidental expenses) and remitting balance, as instructed by the owners ; that,—while it was their custom, and a usual incident of such employment, to procure a custom-house broker to attend to the formal entry of the sugars and liquidation of duties thereon, his fees being one of such "incidental expenses,"—it was not the usage of the sugar-brokerage business in New York, nor did they ever institute suits, nor retain an attorney to do so, for the recovery of excess of duty : "that they never, by writing or otherwise, made any agreement with the plaintiffs in regard to the subject-matter other than hereinbefore specified" (Rec., 17, bot.) ; that they performed all their duties, as sugar-brokers, for the original plaintiffs, making sales, paying the aforesaid charges and expenses, and remitting the proceeds as ordered, for a commission (actually paid) of one-quarter of one per cent. (amounting on the three cargoes in question to

but $886.76), whereby their entire connection with these transactions closed. (Rec., pp. 15 to 21.)

Upon the trial, plaintiffs read their fifteen exhibits, then called a member of the firm of Benj. Burgess & Sons, who testified that they had carried on the sugar-*commission* business in Boston, and had been engaged in business with Bowerman Bros. for more than ten years;

"the general course of which was that Burgess & Sons had sugar consigned to them which they had had sent to Bowerman Bros. to take care of, paying all expenses on them, and finally to sell and remit to Burgess & Sons the proceeds, after deducting expenses and commissions; that Bowerman Bros. paid the expenses on the different importations, excepting sometimes in cases of duties and freight, which Burgess & Sons generally paid; that the remittances from Burgess & Sons to Bowerman Bros. were generally in round sums to cover an approximate amount. The other expenses, except the freight, the plaintiffs knew nothing of until they received the account of sales from Bowerman Bros. The items in Exhibits A and C of payments to J. A. Dreyfuss for services were paid by Bowerman Bros. to Dreyfuss for testing sugars by the polariscope test. In the case of the sugars by the "City of Santiago," the account of which is contained in Exhibit B, annexed to the answer, the plaintiffs made no remittances for duties. In the case of the importation by the "David Bugbee," shown in the account current, Exhibit D, the plaintiffs remitted on account of the duties the sum of $18,000. The total duties in that importation were $26,893.21. This the defendants deducted from the proceeds of the sugars. In the case of the second importation by the "Santiago" the plaintiffs made no remittances for duties; that during the period covered by this controversy, say down to November 1st, 1881, Bowerman Bros. had other sugars of Burgess & Sons in their hands worth about $150,000, and no interest was allowed either upon remittances or sales in the accounts of their transactions. The usual time of credit on sales of sugar is ten days, and during this period the defendants usually had a balance in their hands to the credit of the plaintiffs.

Between 8th March, 1881, and 16th June, 1881, a conversation was had between Burgess & Sons and Mr. Bowerman, in which Burgess & Sons insisted that the commission of the defendants as brokers should be in New York only ¼ of one per cent., because that was the rate in Boston. Burgess & Sons told Bowerman Bros. that their correspondents who sent them sugars objected to the charge of one-half of one per cent., and Mr. Bowerman insisted that the commission should be higher in New York because they had to attend to the *custom-house* business and insuring the cargoes, and doing other things which a broker in Boston did not have to attend to. Still, we told Mr. Bowerman that our correspondents did not wish sugar to come to New York if they had to pay any greater charge to the brokers in New York than they did to the brokers in Boston, and Messrs. Bowerman Bros. said that in view of the probability of our sending them a large lot of sugar that year and afterwards they would reduce their commission to a quarter of one per cent., although it should cover *the same work as before*, and they would go on with the business *just as they had been doing before* for a quarter of one per cent., the brokerage formerly charged. After that Burgess & Sons sent the defendants the sugars spoken of in the conversation and advised their friends to send sugars to New York, and they were so sent. One large lot of Manilla sugars was sent the defendants which amounted to about $80,000. After the receipt of the letter of June 20th (Exhibit 15) Burgess & Sons never received from the defendants any request to take any personal action in the premises or to send them any power of attorney for the purpose, or to attend to the matter instead of the defendants. (Rec., 27, 28; fols. 44 to 46.)

The witness was then asked this question :

Q. State whether or not there was any reliance by your firm by the omission on the part of the defendants to make any such request for your personal attention ; and if so, what? (Fol. 47.)

Counsel for the defendants objected on the ground that the witness should only be allowed to state what they did or what they did not do.

THE COURT: I think it is competent for the witness to say that they assumed that the defendants had commenced a suit.

Counsel for the defendants excepted.

"Answer. We fully relied upon the defendants to attend to the matter." (Rec., 29; fol. 47.)

Cross-examined by the counsel for defendants, he testified;

There were altogether a large number of importations sent here to New York in which Messrs. Bowerman & Bros. acted as brokers and in which we were interested. I do not remember just the amount. *The defendants never commenced suit on any one of them.* We knew they were not lawyers, but brokers for the sale of sugar and molasses. (*Id.*, fols. 48 and 49.)

It was admitted by the defendants that the protests referred to in the pleadings, in reference to the three importations referred to in the complaint, were signed by or in behalf of the defendants, in their name, but intending to act as agents for the plaintiffs. (Rec., 31; fol. 52.)

The plaintiffs then rested, and counsel for the defendant moved to dismiss the complaint on two grounds:

FIRST. That there is no proof that the firm of Burgess & Sons owned these sugars. The proof is to the contrary—that they received them from somebody else and it was not their sugar; that the rebate of duty, if recovered, would belong to the owners of the sugars, and the cause of action, if there be any, against the defendants belongs to the owners of the sugars.

SECOND. That there is no proof of any agreement on the part of these defendants to commence any action whatsoever, nor any proof that they were in any way employed to commence any lawsuit. (*Ib.*)

The motion was denied and the counsel for the defendants excepted. (*Ib.*)

The witness was then recalled by the plaintiffs for the purpose of meeting the first point of the defendants' motion to dismiss, and testified that the firm of Burgess & Sons were interested in the sugars; every cent was to come to them. These sugars came to Bowerman Bros. They were consigned to Burgess & Sons for Messrs. Bowerman Bros. They were not in their name for their convenience. The papers were originally to come to Burgess & Sons. They were consigned to Burgess & Sons and placed in the name of Bowerman Bros. for convenience of entry in New York. There was no formal agreement in writing, but Burgess & Sons had correspondence with Campos & Co. by which Burgess & Sons were interested in the sugars, half of which was theirs by purchase and the other half because they had advanced on them before out there in Cuba. Burgess & Sons were the actual owners of half and had more than fully advanced on the other half. The goods were consigned to cover those advances.

On cross-examination he testified: "The consignment was made by bill of lading and invoice in the regular way. I have not these papers here."

The defendants' counsel then moved to strike out this evidence as to ownership and consignment, because the agreement was in writing and parol testimony could not be received in regard to the facts.

THE COURT: "I think it is competent. I do not know that it is necessary to produce all the correspondence between the parties to show how the title and interest accrued."

The counsel for the defendants excepted. (Rec. 31, 32; fols. 52 and 53.)

The original plaintiffs then introduced three letters written by Benj. Burgess & Sons to Bowerman Bros., the first saying they would have to collect the excess of duty paid of Bowerman Bros., the next letter giving as

the reason that they had "*advised* and *directed*" Bowerman Bros. "to take all necessary steps," etc. (Rec., 32, fols. 54 and 55.)

The third letter is immaterial.

The plaintiffs then rested. (*Id.*, 33, fol. 56.)

Thereupon Bowerman Bros. called a witness and proposed to show the nature of a New York sugar-broker's duties. The plaintiffs below objected; and

"The Court held it was not necessary to show such duties, as *it was admitted* that THE CLAIM WAS NOT FOR FAILURE TO PERFORM ANY SUCH DUTIES." (*Ibid.*)

Bowerman Bros. then introduced further correspondence and oral testimony to show that they had never been expected to commence legal proceedings in *any* case, and had not done so; (fols. 54 to 63) and that Benj. Burgess & Sons did not own the sugars, nor lose the excess of duty; (*Ib.*) and thereupon renewed their motion to dismiss the complaint, and asked to have a verdict directed for them, excepting to the Court's refusal in each instance. (*Id.*)

The Court directed a verdict for the plaintiffs below for $6,105.77. (*Ibid.*)

Assignment of Errors.

The plaintiffs in error assign for error.

1st. The admission, against their objection and exception, of this question, put by plaintiffs below to Walter Burgess:—

"State whether or not there was any reliance by your firm by the omission on the part of the defendants [now plfs. in error] to make any such request for your personal attention? and, if so, what? (Rec. p. 28, fol. 47.)

2d. The refusal to dismiss the suit, upon motion, because of failure to prove the ownership by Benj. Bur-

gess & Sons of the sugars; and because it appeared they did not own them. (Rec., 31, fol. 52.)

3d. The refusal, upon motion of defts. below [now plfs. in error], to dismiss the suit for want of any proof of any agreement upon the part of Bowerman Bros. to commence any action whatsoever, or that they were in any way employed to bring any law suit. (*Ib.*)

4th. The admission of parol testimony to prove the ownership and interest of Benj. Burgess & Sons in these sugars, of which there was documentary evidence. (Rec., 32, top.)

5th. The refusal to allow plfs. in error to show the nature of the duties of a sugar-broker in New York. (Rec., 33, bot.)

6th. The construction given by the Court to the letter of June 20, 1881, from Benj. Burgess & Sons to Bowerman Bros. (Ex. 15) and the reply thereto dated June 21st, 1881. (Rec., pp. 27 and 30–31.)

7th. The refusal to dismiss the case upon all the evidence. (Rec., 37, fol. 63.)

8th. The refusal, on request, to direct a verdict for the original defendants.

9th. The failure to submit the cause to the jury without specific directions which way their verdict should be, and the failure to allow the jury to determine the facts.

10th. The direction given to the jury to find for the plaintiffs in the sum of $6,105.77. Rec., 37, fol. 63.)

11th. The verdict rendered. (*Id.*)

12th. The judgment entered upon the verdict. (Rec., p. 23.)

POINTS.

The plaintiffs' declaration indicates their uncertainty as to the legal foundation upon which to place their claim to recover—whether upon Bowerman Bros.' negligence *as their agents*, or upon the *failure to perform an agreement.*

Accordingly, they couple these inconsistent claims, by declaring first that the Bowermans acted as their agents, and did not obey their instructions; and then that they violated the agreement contained in the annexed correspondence. (Rec., 5-11.)

Between these two stools, their case should come to the ground; for, if Bowerman Bros. were agents, the act omitted to be done manifestly did not come within the scope of their agency; if an agreement is claimed, neither the assent thereto of Bowerman Bros.—the *aggregatio mentium*—nor any consideration is shown.

We will separately consider, first, the character and extent of their agency, and then the elements and nature of the alleged agreement, before touching upon the exceptions upon the minor matters, incidental to the trial.

I.

The first inquiry is, to what business did the *agency* of Bowerman Bros. apply; and what acts could their principals properly require them to perform, *as agents*, for the stipulated compensation?

It appears by Walter Burgess' testimony (Rec. 27, 28.) that Bowerman Bros. were *only* employed "as brokers" of sugars imported; and were to have the ordinary *Boston* commission of one-quarter of one per

cent. for services in that capacity, instead of the regular New York rate of one-half per cent., which they had been theretofore receiving; and, for this reduced rate, they were to do just what they had been doing before for the higher, including *the same* custom-house business which they had previously done. (Rec., 28, fol. 46.)

This remits us to inquire what acts—especially what in connection with the Custom House—they had theretofore done, as such agents.

The same witness testified that, of the large number of importations into New York in which his firm was interested, and of which Bowerman Bros. were the brokers, the latter never commenced suit upon any one of them. (*Id.*, 29, fol. 49.)

Wm. D. Bowerman testified that his firm had never brought any suits as brokers for any importers of sugars; it was not their business, nor any part of their business, to institute such suits. (Rec. 36, fol. 60.)

Thus it appears, from the statement of both parties, that the continued doing for half the former commission of all such things as Bowerman Bros. had theretofore been doing as agents for Burgess & Sons did not, *ex vi termini*, require Bowerman Bros. to institute any actions.

So far as there was an *express* assumption of duty by Bowerman Bros., it did not include this; if aught else was *implied*, from the undertaking to act *as brokers*, for a brokerage commission, then we were entitled to show what that implication embraced; and that it did not cover the initiation of litigation for refunds.

But an express stipulation that the half-pay should only entitle Burgess & Sons to the *same* services as previously had been rendered excludes all implication.

"Implied promises, or promises in law, exist only when there is no express promise between the parties."

Hawkins vs. U. S., 96 U. S., 697, bot.

Cutter vs. Powell, 2 Sm. L. C., 1.

Whiting vs. Sullivan, 7 Mass., 107.
Galloway vs. Holmes, 1 Doug. (Mich.) 330.
Weston vs. Davis, 24 Me., 375, bot.
Britton vs. Turner, 6 N. H., 491, bot.

Here was the declaration which excludes any implied promise; (7 Mass., 107) the special, definite promise which shut out any general obligation arising from mere employment in the agency.

Ladd vs. Franklin, 37 Conn., 62.

Even where a contract is of a character which is ordinarily affected by and based upon a custom, yet express stipulation upon the subject to which the custom relates will exclude the custom.

Roberts vs. Barker, 1 C. & M., 808.

If this were a contract of Bowerman Bros. to act generally as the agents of Burgess & Sons in the sugar-brokerage business, in New York, without special limitation of the duties to be performed in the discharge of such agency, then we should have been permitted to show what the duties of a sugar broker were (Rec. 33, bottom) which was objected to and excluded, because

"The Court held that it was not necessary to show such duties, *as* IT WAS ADMITTED *that the claim was not for any failure to perform such duties.*" (*Ibid.*)

This remits us to an examination of the letters that passed between the parties, to determine whether there was any *agreement* between Bowerman Bros. and Burgess & Sons (*independently of the sugar-brokerage agency*) whereby the former obligated themselves to incur the labor and responsibility of instituting and prosecuting actions for refunds.

The ruling and statement of the Court virtually strikes out of the complaint all averments of agency and of failure to perform its obligations; certainly, so far as these are there made any ground of action.

It shows that the Judge did not direct a verdict upon any *such* ground.

II.

"An executory contract is one in which a party binds himself to do, or not to do, a particular thing." MARSHALL, C. J., in Fletcher vs. Peck, 6 Cr., 136.

What "particular thing" are Bowerman Bros. charged with having bound themselves, and then omitted, to do?

They are declared to have assumed, and neglected, "the duty" of bringing suit, as agents of Burgess & Sons, against the collector (Rec., 5, "Third;" 7, bottom; 10, fol. 12, *Ante*, p. 2).

No such "duty" could devolve upon them, unless they bound themselves to do it; nor any legal obligation, except upon some *consideration* for their undertaking to perform.

When, where, how, with whom, and upon what consideration did Bowerman Bros. ever agree to sue the collector for Burgess & Sons? They swear they never made any such promise to anybody, anywhere, under any circumstances. (Rec., 16, 17, 19 to 21.)

The complaint (see paragraphs "Third;" Rec. p. 5, etc., *Ante*, p. 2,) alleges that they were bound to bring suits "as such agents" of Burgess & Sons; but, upon the trial, this idea was abandoned, and "it was admitted that the claim was not for any failure to perform such duties." (Rec., 33, bottom).

Walter Burgess testified (Rec. 28, fol. 46) that it was part of the Bowermans' sugar-brokerage business in New York, "to attend to the *Custom House* business;" *i. e.*, to business *there* transacted, necessary as a prerequisite to making any sale or delivery of the sugars

to customers; and this service was part of that for which the commission compensated them. (*Ib.*)

Litigations to be conducted in the Courts, and to drag along there for thirty years and more (as have the cases now upon trial in New York at the date of present writing) were *not* within the scope of their engagement nor covered by their commission of one-quarter of one per cent. They never undertook to prosecute, nor to become responsible to attorneys and counsel for prosecuting, any such suits.

That they did not assume this burden by merely acting as sugar brokers, and for the reduced commission, is "admitted." (Rec. 33, bot.) Then they must have made some *other* agreement, upon some *other* consideration, to act as Burgess & Sons' agents in doing this work, if they undertook it at all.

If they did not voluntarily, and for a consideration, assume the obligations of *such* an agency, then no "instructions" (Rec. p. 5, "Third") could impose it upon them, since the authority to instruct was wanting. The fact that they were agents for another purpose, in the ordinary course and scope of their accustomed business and relations, would not affect their legal position and rights at all as to every matter outside of this special agency, business and relation.

The complaint states (Rec., 5; 8; 10.) that "the said written instructions" of the plaintiffs to the defendants, "and the written agreement made by them as aforesaid" are all "contained in the said exhibits" *annexed*. If we find no *agreement* to bring suits there, the complaint concedes it exists nowhere else.

We will briefly run over the pertinent parts of such of the annexed exhibits as make any reference to bringing suit; noticing that the ninety days' limitation commenced to run against the three cargoes in this order of date, viz.: April 13th, May 27th and Nov. 2d, 1881. (Rec., 37, top.)

The original plaintiffs' first "annexed" exhibit is letter of Jan. 27, 1881 (Rec., 11, bottom) which says:

"If they should be decided against us we must protest, so soon as the duties are paid, and place the matter in the hands of a first-class lawyer, the one employed by Messrs. Knowlton, perhaps, unless you know of a better, to commence the suit as soon as possible; but we hope this will not be necessary."

Exhibit 2 is Bowerman Bros.' answer to the foregoing, dated the next day, acknowledging receipt in two lines: "contents noted, all of which will be duly attended to."

April 15, 1881, (Ex. 12) Bowerman Bros. acknowledge their correspondents' favor of the preceding day (not an exhibit) and notify them that the Secretary has affirmed the Collector's decision on the sugars per 'Santiago,' and concluding:—"We suppose you will wait the decision in the Welch suit before commencing proceedings." (Rec., 13.) Replying the next day (Ex. 11) Burgess & Sons say:—"We would await the decision in the Welch suit before commencing proceedings, if there is time." (*Ib.*)

Exhibit 14 is this letter from Bowerman Bros., and it is here quoted in full, as indicating their undertaking, and as eliciting in reply the letter of June 20, 1881, upon which the plaintiffs below chiefly relied (Rec., 28, bottom) and specially mentioned in their complaint as Exhibit 15. (Rec., 5, 8, 10. *Ante*, p. 3.)

We will give both exhibits in their order; being the last of those referred to in the complaint as constituting the agreement and "annexed." (*Ib.*)

(Ex. 14.)

"June 18, 1881.

MESSRS. BENJ. BURGESS & SONS, Boston.

GENTLEMEN:—We presume we have in mind the "Santiago's" cargo centrifugal "Angelita" which arrived here July 6th 1880, the most of which was raised

on polariscope test one fourth cent and 25 per cent. above the legitimate rate of entry on Dutch standard, and *will commence suit against the Government in due season.*" (Rec., 14.)

[REPLY: EX. 15.]

"June 20, 1881.

We have your favor of the 18th, in which you say, "We presume you have in mind the Santiago's cargo centrifugal Angelita which arrived July 6, '80, the most of which was raised on polariscope test one-fourth and 25 per cent. above the legitimate rate of duty on Dutch standard, and will commence suit against the Government in due season."

The cargo you refer to did not pay at all, as we understand, duty above the Dutch standard, it having just escaped on dry test.

Of course, we must not let any of our cases escape due attention.

We attend here to all our Boston cases, and enter suits as fast as they come around, and we suppose you can do the same, as our agents in New York. Are we right? Please look into every case and keep us timely informed, and whether there is anything for us to do personally or by power." (*Ib.*)

The "third" paragraphs of the three several causes of action set out in the complaint conclude with this allegation in reference to the failure of Bowerman Bros. to reply to Ex. 15, and the consequent inaction of Burgess & Sons:

"They made no response to the letter, Exhibit 15, *in respect to the matters therein referred to*, and the plaintiffs relied upon their bringing suits in New York pursuant to the *instructions therein* contained, and consequently did not *instruct* any one else to bring such suits on behalf of the plaintiffs, which the plaintiffs would have done had the defendants notified them that they declined to follow the said *instructions*, which notification the defendants did not give to the plaintiffs." (Rec., 5, 8, 10. *Ante*, p. 2.)

It will be observed that there was *not* a failure to answer Ex. 15 at all, but only "in respect to the matters therein referred to." (*supra.*)

Defendants' Ex. No. 17 was the answer:

NEW YORK, June 21st, 1881.

MESSRS. BENJ. BURGESS & SONS, Boston,—

GENTLEMEN,—We have received your favor of yesterday. You are right about the duties on cargo sugar ex Santiago, July 6, 1880. We had it down "Paid under protest" by mistake. We enclose you Woodruff & McLean's storage bill on Bugbee's cargo, which is less than usual rates by agreement. Our market is quiet but firm for good sugars, with sales as below. Yours truly, BOWERMAN BROS." (Rec., 29-30; 30-31.)

There was an immaterial postcript. (*Ib.*)

So this action is *not* for negligence in omitting to answer a letter, but *in not bringing suits.* (see *supra*, and *ante*, p. 2.)

And it proceeds upon the novel theory, that failure to explicitly reject a written proposition is an acceptance of it, creating an obligation to perform the proposed undertaking!

Bowerman Bros.' letter of June 18, 1881 (Ex. 14, *supra*) distinctly drew the attention of Messrs. Burgess & Sons to the fact that they must bring their own suits.

They so understand it; and thereupon they reply (June 20, 1881—Ex. 15, *supra*) suggesting that—while they bring their Boston suits, as occasion demands—they "*suppose*" Bowerman Bros. "*can* do the same, as our agents in New York." (*Ib.*)

Answering this letter the very next day, Bowerman Bros. ignore this suggestion or supposition. (see sup. Rec. 29-30, etc.) And it is claimed that this omission to refuse—because it was taken by Burgess & Sons as an acceptance, and in reliance thereupon they employed nobody else to do this work—imposed the legal consequences of explicit acceptance and then of neglect to perform the accepted duty (*ante*, p. 2—"Third.")

Of this allegation of the complaint, it may be observed that it contains a negative pregnant; the assertion that it was in reliance and consequent upon Bowerman Bros.' failure to respond [*fully*] "in respect to the matters therein referred to" that Burgess & Sons "did not instruct any one else to bring such suits" (*ante*, p. 2) is a negative, pregnant with the admission that Bowerman Bros. were under no *precedent* obligation to sue, but were *then* at liberty to decline; and Burgess & Sons equally at liberty to employ other agents in New York for that purpose.

This is, manifestly, the *fact* upon the evidence; but this averment admits it to be so upon the pleadings.

Then, as to this subject-matter of bringing suits, the parties were dealing with each other independently of prior relations and upon the ordinary footing of such negotiations; requiring a definite proposition upon one side, accepted by the other, upon sufficient consideration.

It may well be that previous relations to each other and to these sugars constituted the *inducement* to the proposing of the new contract, but not any *consideration*, even had it been accepted. (Philpot vs. Gruniger, 14 Wall., 577, middle.) As things were left, there was neither *acceptance* nor *consideration*.

Certainly, there was no acceptance. In such a case, silence is rejection—not acquiescence.

Taylor vs. Rennie 35 Barb., 276.
Myers vs. Smith, 48 *Id.*, 614.
Elliott vs. Riddle, 2 F. & F. 142.

To make a valid contract it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but *they must communicate that fact to each other*, so that both parties may *know* that their minds do meet."

Frith vs. Lawrence, 1 Paige, 442, bot.
Minneapolis vs. Columbus, 119 U. S., 151.
Brown vs. N. Y. Cent., 44 N. Y., 79.
Nundy vs. Matthews, 35 Hun, 78.

Topping vs. Swords, 1 E. D. S., 610. bot.
Baxter vs. Bishop, 65 Iowa, 582.
Pew vs. Gloucester, 130 Mass., 397.

Whatever contract existed between these parties was a *New York* contract. The effort to make an agreement as to the institution of suits (whether successful or not) was an attempt to make a New York contract, to be there executed. Hence, if there were any difference, upon this subject, between the Massachusetts and New York decisions (which we understand there is not) the latter would indicate the legal rules applicable to the formation, as well as to the performance of the contract.

McIntyre vs. Parks, 3 Metc., 207.
Hazard vs. Ins. Co., 1 Sumn., 224; 8 Pet., 586.
Vassar vs. Camp, 11 N. Y., 441.
Trevor vs. Wood, 36 *Id.*, 307.
Howard vs. Daly, 61 *Id.*, 365-6.
Wayne vs. Low, 6 Ab. N. C., 90.
Chiles vs. Nelson, 7 Dana, 281.
Levy vs. Cohen, 4 Ga., 1.
Tayloe vs. Ins. Co., 9 How., 390.

It is the most elementary of all legal propositions that there must be a mutual *assent* to—not a mere failure of either party to dissent from—the proposal made; yet that seems to show the erroneous character of the ruling in this case.

Unless Burgess & Sons, by what was contained in these letters, were *bound* to permit Bowerman Bros. to commence and conduct this litigation, *and to pay them* for so doing, then the latter were not bound.

Tuttle vs. Love, 7 Johns., 470.
Tucker vs. Woods, 12 *Id.*, 190.
Eliason vs. Henshaw, 4 Wh., 225.
Head vs. Ins. Co., 2 Cranch, 127.
Essex vs. Collins, 8 Mass., 299.
Carr vs. Duval, 14 Pet., 77.

N. Bk. vs. Hall, 10 U. S., 48, bot.
Martin vs. Black, 21 Ala., 729, DARGAN, C. J.
Hutchison vs. Bateman, 3 Met. (Ky.), 80.
Allen vs. Roberts, 2 Bibb., 98.
Emerson vs. Graff, 29 Pa., 358.
Slaymaker vs. Irwin, 4 Whar., 380.
Beckwith vs. Cheever, 21 N. H., 41.
McKinley vs. Watkins, 13 Ill., 143, TRUMBULL, J.
McClay vs. Harvey, 90 *Id.*, 525.
Esimay vs. Groton, 18 *Id.*, 486–7.
Valkenburgh vs. Rogers, 18 Mich., 180.
Forster vs. Ulman, 64 Md., 531.
Knight vs. Cooley, 34 Iowa, 218.
Greve vs. Granger, 36 Wis., 369.

The inquiry, "Are we right?" found in Exhibit 15, Burgess & Sons' letter of June 20, 1881 (Rec., 14, 27), shows the expectation of a reply, to settle the matter of bringing suit.

"This language, in such a connection, *can mean nothing else* than that the defendant was expected to signify his assent to the terms thus set forth. *That being done*, the agreement would be complete, and it would also be in writing, so as to leave no room for future controversy. This, we are satisfied, is the true interpretation of the letter; and it follows that *no contract was made*."

Hough vs. Brown, 19 N. Y., 114, bot.
Head vs. Ins. Co., 2 Cranch, 166.

The whole testimony shows that Bowerman Bros. never did mean to bring suit; that the omission to do so was because it did not constitute any part of the services covered by their commission, nor of their business.

It is "admitted" that they were not *bound* to do it, as part of their agency. The correspondence shows that they never promised to do it, upon any new consideration, nor by any new engagement.

Even if, upon receipt of Burgess & Sons' letter of June 21, 1881 (Ex. 15), Bowerman Bros. had *thought* they could do this easily, and so would do it (of which

there is no evidence), this would be of no consequence. It is *only* a communicated assent, and not a *mere* emotion of the mind, that consummates a contract.

"The mere determination of the mind, unacted upon, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is by the sending of a letter *announcing a consent to accept;*"—not, merely, an omission expressly to decline.

Trevor vs. Wood, 36 N. Y., 310, top.
Palo Alto, 2 Ware, 357–8.

"It is highly probable that when the defendants received the plff's order of Oct 27 they *intended* to fill it; otherwise, they should have notified him, and not by their silence have led him to infer that the nails would be forwarded, when they had no intention of doing it. And if such an intention would be sufficient to complete the contract, and render it binding upon the parties, we might, perhaps, be justified in inferring it from the defts.' silence, and other facts testified to by the plaintiff. But *we are not satisfied that such an intention, locked up in the breast of a party, and not communicated to the other is sufficient in any case to constitute such an acceptance of a proposition as to create a binding contract. We think it would not.* It would be unjust to the other party to hold him bound by such an acceptance; and, unless both parties would be bound by it, neither would be, for want of mutuality."

Jenness vs. Mt. Hope, 53 Me., 23.
Belfast vs. Unity, 62 *Id.*, 148.

To like effect, per FOLGER, J., is *White vs. Corlies*, 46 N. Y., 467.

"First comes the mental resolve to accept the proposition; but the law can only recognize an overt act."

Hallock vs. Ins. Co., 26 N. J. L., 280.
Mactier vs. Frith, 6 Wend., 103.
Trevor vs. Wood, 36 N. Y., 307.
Troutstine vs. Sellers, 35 Kans., 447.

Was there any CONSIDERATION for the alleged agreement?

Certainly none is *stated* in the correspondence; nor, indeed, in the record, except it was that commission which was payable for those services covered by the agency;—and "it was admitted that the claim was *not* for any failure to perform such duties." (33, bot.)

What the Iowa Court said, of a cause before it, is true of this;—

"The intervenors not only declared upon a written agreement, but they declared that Bishop's *letter and their reply constituted the agreement.*"

Baxter vs. Bishop, 65 Iowa, 584.

Consequently, the Court was confined to the effect of those documents.

The complaint specially setting up the letter of June 20 (Ex. 15) and the omission to allude to this subject in the next day's reply as constituting the contract, inspection of these shows there was no consideration *expressed*. If any is *implied*, it must be the general *quantum meruit*—to pay whatever the services may be worth. The relation of the parties was such, however, that such an implication is by no means the *necessary* inference to be drawn from this letter, Ex. 15. It is equally consistent with the proofs to suppose Burgess & Sons asked this *as a favor* of Bowerman Bros.; or imagined at the time that it came within the scope of the agency, although it is now apparent from the testimony of both parties, and the admission mentioned by the Court (33, bot.) that it was not in fact embraced therein.

Potter vs. Carpenter, 76 N. Y., 157.
Pew vs. Bank, 130 Mass., 305.

If this question was debatable, then the evidence of what was the usage of brokers in New York was improperly excluded. (*Ib.*) It was expressly testified

that the brokers in Boston never did anything of the kind for their commission, which was the one which Bowerman Bros. were persuaded to accept.

It was erroneous for the Court to assume the existence of this element of a consideration. If the relation of agency is supposed to have created any, it was only a consideration for the performance of *its* duties, and its functions (which never included *this* act) had all been discharged, the commission fully earned, and these things could not (at best) constitute anything more than a *past* consideration.

Utica vs. Brinkerhoff, 21 Wend., 140, NELSON, C. J.
Macedon vs. Snediker, 18 Barb., 318.
Beverly vs. Holmes, 4 Munf., 95.

In other words, if it were claimed (which is not—33, bot.) that Bowerman Bros. were bound to bring suit, to earn their commission, then we should have been permitted to introduce the excluded evidence (*Ib.*) to refute this claim:—if such was *not* their obligation, then an *express* promise to sue would have been *nudum pactum*, so none such can be *implied*.

Thorne vs. Deas, 4 Johns., 84, 97. KENT, C. J.
Burnet vs. Bisco, *Id.*, 236.
Smedes vs. Utica, 20 *Id.*, 379.

Thorne vs. Deas is "the leading case" in New York. Nellis vs. DeForest, 16 Barb., 62, bot.
Rose vs. U. S., 3 Ab. Pr. (N. S.), 310; 6 Robt., 307.
Boniface vs. Relyea, 5 *Id.*, 267; 6 Robt., 405.
Doupe vs. Genin, 1 Sweeny, 32.
Coleman vs. Eyre, *Id.*, 483.
Peo. vs. Shall, 9 Cow., 778.

"A contract without consideration will not be enforced; and so *any part which can be separated from the rest and shown to be without consideration* will not be enforced."

Doebler vs. Waters, 30 Ga., 347, STEPHENS, J.

If we concede the relations between the parties to

have been such that *courtesy* required a response to the inquiry in the letter of June 20, 1881: that would not help the matter. Had this relationship imposed a *moral obligation* upon Bowerman Bros. to reply and, feeling this, they had answered affirmatively—even then, there would have been no *legal* liability for not performing a promise so made.

Cook vs. Bradley, 7 Conn., 62.
Littlejohn vs. Patello, 2 Hawks, 302.

If the parties differed upon this very question of consideration, the one claiming that such services would entitle Bowerman Bros. to compensation and the other that they were to be gratuitous, or part of those for which the commission compensated them, then the parties would be at issue upon an essential element of the alleged contract. How the *fact* was the jury should have been permitted to determine.

Pendleton vs. Empire, 19 N. Y., 13.
Smith vs. L. I., 32 Hun, 39.

Unless the parties understood this alike, there was a disagreement as to the very first element of Burgess & Sons' proposal.

Hazard vs. Ins. Co., 1 Sumn., 225.
Greene vs. Bateman, 2 W. & M., 359.
Schenectady vs. Holbrook, 101 N. Y., 48.
Brown vs. N. Y., 44 *Id.*, 83, near bot.

Whether or not there was this disagreement was for the jury.

Powell vs. Powell, 71 N. Y., 71.
Hart vs. Hudson, 80 *Id.*, 622.

The declaration infers an agreement to sue, as requested, merely from an omission to *expressly* refuse to do so (although two days before the request Bowerman Bros. had reminded Burgess & Sons to bring their own actions—Rec., 27, top); and then implies—either a

quantum meruit compensation or none at all for this service!

"We are, therefore, of opinion that the jury would not have been warranted in drawing the conclusion of fact, from the evidence in the case, that there was any such agreement as that sued on, and that the relation of the parties, as shown in the circumstances of the transaction, were not such as, in contemplation of law, to give rise to any such liability." Eldred vs. Bell, 119 U. S., 522.

III.

The exception taken to the following question has a close relation to the subjects heretofore discussed:

"Q. State whether or not there was any reliance by your firm by the omission on the part of the defendants to make any such request for your personal attention; and, if so, what?" (Rec. 28, fol. 47).

The defendants' objection was thus disposed of:

"THE COURT: I think it is competent for the witness to say that they assumed that the defendants had commenced a suit." (*Ib.*).

Thereupon Walter Burgess gave this

"Answer. We fully relied upon the defendants to attend to the matter." (*Id.*, 29, top.)

The complaint avers that plaintiffs would have sued, if notified that defendants declined to do so. (Rec. 5, 8, 10; *ante*, p. 2).

The admission of the foregoing testimony indicated the adoption by the Court of the plaintiffs' theory, that an obligation to sue, not theretofore existing, could originate from a mere failure expressly to refuse to do so; or, as the question puts it, from an "omission" to request the personal attention thereto of the real parties

in interest, *after June 20th, 1881, having already done so on the 18th of that month.* It is an "*omission*" only of which they complain; upon which reliance was placed, and which affected their own action. But the contractual relation does not arise from an omission to refuse; and that of brokerage agency is admitted not to be the basis of the claim.

The question of "reliance" had no business in the case. If plaintiffs had a *legal* right to rely, it must be by contract; and if there was a contract for defendants to sue, the plaintiffs can recover, without further proof of any reliance upon it.

IV.

All that passed in relation to the particular subject-matter which is the basis of this action was in writing; hence, whether or not it amounted to a legal contract was for the Court. Taken by itself, the correspondence does not show a contract, and the motion to dismiss should have been granted. If any weight is to be given to the sugar-brokerage relations of the parties, and these letters are to be considered in connection therewith, or as affected thereby—or by any parol transactions—then the whole should have been submitted to the jury together, and it was error to direct a verdict for the plaintiffs. (Rec., 37, bottom).

Etting vs. Bank, 11 Wheat., 59.
Barreda vs. Silsbee, 21 How., 168.
Iasagi vs. Brown, 17 *Id.*, 183, *196.*
West vs. Smith, 101 U. S., 270.
Goodlett vs. Louisville, 122 *Id.*, 411.

EDWIN B. SMITH,
120 Broadway,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1887. No. 187.

BENJAMIN F. BOWERMAN AND HENRY A. BOWERMAN,

Plaintiffs in Error,

vs.

WILLIAM C. ROGERS AND FRANCIS C. WELCH, Assignees of BENJAMIN F. BURGESS AND WALTER BURGESS,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

EVERETT P. WHEELER,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

BENJAMIN F. BOWERMAN *et al.*,
Plaintiffs in Error,

vs.

WILLIAM C. ROGERS and FRANCIS C. WELCH, Assignees of BENJAMIN F. BURGESS and WALTER BURGESS,
Defendants in Error.

October Term, 1887.
No. 187.

Brief for Defendants in Error.

Statement of Facts

The writ of error in this case was brought to review a judgment of the Circuit Court of the United States for the Southern District of New York. The judgment was entered upon the verdict of a jury rendered under directions of the Court in favor of the plaintiffs, William C. Rogers and Francis C. Welch, assignees of Benjamin F. Burgess and Walter Burgess, defendants in error, against Benjamin F. Bowerman and Henry A. Bowerman, defendants, now plaintiffs in error.

The action was commenced December 27, 1882, was tried January 16, 1884; judgment was entered September 10, 1884; and the writ of error was sued out September 17, 1884.

The references in this brief are to the printed pages of the record.

The action was brought to recover damages from the defendants resulting from their failure to obey the instructions of the plaintiffs towards whom the defendants held the relation of agents.

During the pendency of the action the claim was assigned to Rogers and Welch, who were, thereupon, substituted as plaintiffs (p. 22).

The complaint has annexed as exhibits, extracts from the correspondence between the parties (pp. 11–14). These, and most of the other allegations of the complaint, are admitted by the answer (pp. 15–21). From this correspondence and these admissions the following facts appear:

The original plaintiffs were a firm of sugar merchants, engaged in business in Boston, under the firm name of Benjamin Burgess & Sons. Defendants were a firm of brokers, in the city of New York, under the name of Bowerman Brothers, with whom Burgess & Sons had been doing business for more than ten years (pp. 27,28). The general nature of the business was, that Burgess & Sons had bought sugar which their vendors had consigned to Bowerman Bros. to take care of, pay all expenses relating to the sugars, and finally to sell and remit to Burgess & Sons the proceeds, after deducting expenses and commissions; that Bowerman Bros. paid the expenses on the different importations, excepting some cases of duties and freight, which Burgess & Sons generally paid. In January, 1881, 781,046 pounds of sugar were shipped under the instructions of Burgess & Sons to New York, consigned to the Bowermans, by the steamer "Santiago"; in March, 1881, 956,852 pounds of sugar were shipped under like instructions to New York, consigned to the Bowermans, on board the brig "David Bugbee," and in August, another cargo of 19,746 pounds of sugar was shipped to New York, consigned to the Bowermans, on board the "Santiago."

The Bowermans received these sugars, entered them in the Custom House in New York, ascertained the duties thereon, and sold the sugars, and out of the proceeds of the sale, paid the duties as well as charges, storage, and other incidental expenses, and a commission to themselves, of one half and afterwards of one quarter of one per cent. on the total amount realized.

At the time of the importation of these sugars, a question had arisen in regard to what should be a proper test to ascertain what duties were payable by importers of such sugars, the U. S. Government contending that the determination should be made by the polariscope, while the importers contended that the test by which the determination should be made should be the Dutch standard in color.

The Collector of Customs ruled that the test of polariscope should be applied. The Bowermans acting for Burgess & Sons, paid the duty estimated according to the aforesaid polariscope test, and duly protested in writing, setting forth their grounds of objection, to the amount of duty claimed by the United States (p. 31). They also duly appealed to the Secretary of the Treasury from the determination of the collector, and the Secretary of the Treasury rendered his decision upon this appeal adversely to the Bowermans, affirming the decision of the collector (p. 29). The Bowermans were requested by Burgess & Sons to bring suit against the collector to recover the difference in amount between the duties paid by them under this decision of the collector, and the amount of the duties claimed by them to be properly payable on the sugars (pp. 24, 26, Ex. 1, 15). According to the Revised Statutes of the United States, (§ 2,931) this suit should have been brought within ninety days after the decision by the Secretary of the Treasury. The Bowermans failed to obey these instructions and did not bring suit within the time limited by law. It was afterwards decided by this Court affirming the judgment of the Circuit Court (Merritt, Collector of the port of New

York, against Welsh, 104 U. S., 694), that thecontention of Burgess & Sons in regard to the proper method of testing the sugar for the ascertainment of the duty was correct. That is to say that the amount of duty collectible upon the sugar should be determined by the Dutch standard in color of sugars exclusively, without regard to the polariscope, and that the duties levied and collected upon sugar imported into the United States upon any other test were erroneously and illegally exacted. After this decision had been rendered, the Bowermans, in behalf of Burgess & Sons, requested the collector to pay back the excess of duty upon the three importations of sugar, to which the importers were entitled under said decision. But the collector declined to do so, on the ground that the suit had not been brought within ninety days from the date of the Secretary's decision (Ex. 16, p. 29).

Burgess & Sons relied upon the Bowermans to bring an action against the Government within the time limited by law, and took no steps themselves to do so, but left the matter entirely in the hands of the Bowermans (p. 29). Burgess & Sons having by the negligence of the Bowermans in omitting to bring suit, lost the opportunity to recover the difference between the duties which ought to have been charged under the decision of Merritt *vs.* Welsh, brought this suit against the Bowermans to charge them with this loss.

The Bowermans made no attempt, to contradict any of the material allegations of the plaintiffs' case beyond stating that their firm had never brought any suit as brokers for importers of sugars ; and that this is not their business, and that in respect to these particular sugars, their understanding was, that they had no right to commence a law suit (pp. 35, 36).

The Bowermans took two exceptions to the admission of evidence, and excepted to the denial of their motion to direct a verdict in their favor. The denial of this motion will be first considered. It was made on two grounds, to wit, that there was no proof that Burgess

& Sons owned the sugars; and because there was "no proof of any agreement on the part of these dedants to commence any action whatsoever, nor any proof that they were in any way employed to commence a law suit" (p. 31).

The proof of the ownership of the sugar was afterwards supplied (p. 31), so that it does not become necessary to consider this ground of the motion.

POINTS.

First.

Bowerman Bros. duty as Factors.

The Bowermans were the general agents of Burgess & Sons in all things in and about the care of the sugars from the time they arrived in the port of New York. When Burgess & Sons bought sugar, they consigned it to the Bowermans to "take care of." The Bowermans paid all expenses on these consignments, "excepting sometimes in the cases of duties and freight, which Burgess & Sons generally paid." The Bowermans sold the sugar and remitted the proceeds to the plaintiffs after deducting their expenses and commissions. "The other expenses, excepting freight, the plaintiffs knew nothing of until they received the account of sales from Bowerman Brothers." The latter "had to attend to the Custom House business, and insuring the cargo, and doing other things which a broker in Boston did not have to attend to" (pp. 27, 28).

The testimony of Mr. Burgess (fols. 44 to 47) shows the general nature of the Bowermans' employment. Their duties were not confined to selling the sugar, nor to getting it through the Custom House. They were

factors, and, as such, were the general agents of the plaintiffs in all things in and about the management of the sugar from the time it arrived in New York until it was sold. Their employment was far more comprehensive in its character than that of a sugar broker, who merely receives a consignment of sugar for sale.

Even in the absence of the specific instructions given by the plaintiffs, which will be considered in the next point, it was the duty of the Bowermans, as factors, to employ counsel to prosecute the action against the government to recover the excess of the duties paid. This duty arose out of the very nature of their employment. Factors are general agents. "An agent is bound to great diligence and care for his principal; not the utmost possible, but all that a reasonable man, under similar circumstances, would take of his own affairs."

1 Parsons on Contracts, p. 85.

"An agent who is entrusted with general powers, must exercise a sound discretion, and he has all the implied powers which are within the scope of his employment."

Kent, Com., Vol. 2, p. 617, star paging.

It is because a factor has to exercise broad and wise discretion in the management of the thing entrusted to him, and because, in order to exercise this discretion for the benefit of his principal, he may have to perform acts not contemplated by the parties, that the law gives him a comprehensive lien upon property in his possession.

"It is now incontrovertibly established as a matter of law, derived from long usage, and admitted without proof, that factors have a general lien upon every portion of the goods of their principals in their possession, and upon the price of such as as are lawfully sold by them, and the securities given therefor, for the general balance of account between them and their principal, as

well as for charges and disbursements arising upon those particular goods. The lien may also extend to all sums for which a factor has become liable as surety or otherwise, for his principal."

Story on Agency, Sec. 376.
Bryce *vs.* Brooks, 26 Wend., 367, 375.

It is the existence of this lien which takes away all force from the Bowermans' averment that the amount which they would have to pay to employ competent attorneys would have amounted to more than their total commissions. Had they employed counsel, the defendants would have a lien upon the sugar, for the amount paid by them for legal expenses.

Second.

Specific Instructions from Burgess & Sons.

In addition to the Bowerman's obligation to bring the suit against the Collector, arising from the nature of their business as factors, the duty was imposed upon them by the express and explicit instructions of their principals.

In their letter of January 27, 1881, Burgess & Sons wrote to the Bowermans, requesting them, if this question of a sugar test should be decided against them, to "place the matter in the hands of a first-rate lawyer" and "to commence the suit as soon as possible." (Exhibit 1, p. 24.) In reply to this, the Bowermans wrote on January 28, 1881, to Messrs. Burgess, "Your favor of yesterday is received and contents noted, *all of which* will be duly attended to." (Exhibit 2, p. 25) On April 16, 1881, Burgess & Sons wrote to the Bowermans to "await the decision in the Welsh suit before commencing proceedings, if there is time." (Exhibit 11, p. 26.) On June

18, 1881, the Bowermans wrote to Burgess & Sons stating that they would "*commence suit against the government in due season.*" (Exhibit 14, p. 27.) On June 20, 1881, Burgess & Sons wrote to the Bowermans, "We attend here to all our Boston cases, and enter suits as fast as they come around, and we suppose you can do the same as our agents in New York. Are we right? Please look into the case, and keep us kindly informed whether there is anything for us to do personally or by power." (Ex. 15, p. 27.)

Factors and agents are bound to follow the instructions of their principals strictly.

Brown *vs.* McGran, 14 Pet., 479.
Johnson *vs.* N. Y. C. R. R. Co., 33 N. Y., 610.
Wilson *vs.* Wilson, 26 Penn. Stat., 393.
Scott *vs.* Rogers, 31 N. Y., 676.
Hays *vs.* Stone, 7 Hill, 128.
Hilton *vs.* Vanderbilt, 82 N. Y., 591.

And when they fail to follow the instructions of their principals they make themselves liable for the whole amount of the loss caused thereby.

Rundle *vs.* Moore, 3 Johnson's Cases, 36.
Hamilton *vs.* Cunningham, 2 Brock., 350, 366.
Exchange National Bank *vs.* Third National Bank, 112 U. S., 276.
1 Parsons Contr., 85.

In the case at bar, the duty of the Bowermans to bring suit against the government in due season arose in three ways, to wit: (1) from the nature of their relation to Burgess & Sons as their factors, independent of instructions; (2) from their duty to obey the express instructions of their principals, and (3) from the express agreement of the Bowermans to bring the suit, for they wrote on June 18th, 1881, that they would "commence suit

against the government in due season" (Exhibit 14, p. 14.)

The motion to direct a verdict for the defendants below, was, therefore, properly denied, and the motion to direct a verdict for the plaintiffs below properly granted.

Third.

Exceptions to the Admission of Evidence.

1. On the direct-examination of Walter Burgess, a witness for the plaintiffs below, he was asked the following question (p. 28).

"Q. State whether or not there was any reliance by your firm on the omission on the part of the defendants, to make any such request for your personal attention; and if so, what?"

Counsel for the defendants objected on the ground that the witness should only be allowed to state what they did or what they did not do."

This exception was not well taken. The question of whether Burgess & Sons relied upon the Bowermans to bring the suits against the Government, was a fact material to the issue, and was properly admitted.

King *es.* Fitch, 2 Abb. Ct. App. Dec., 508, 515, 524.

2. The second exception was to the denial of the motion to strike out the evidence as to the ownership and consignment of the sugar (p. 32). The ground of the objection was that the consignment having been made by bill of lading and invoice, parol evidence was not admissible to prove those facts.

It is well settled that the rule as to the inadmissibility of parol evidence to contradict or vary a valid written instrument, or to prove the facts of which, as between

the parties thereto, the writing is the best evidence, does not apply where one of the parties in the action is a stranger to the instrument.

The rule was well stated by Chief Judge Folger in Sprague *vs.* Hosmer, 82 N. Y., 466. He says (p. 470):

"A stranger to a written instrument may dispute the truth of its contents by oral proof; and, so far as a controversy is with a stranger to it, a party to it may do the same; McMaster *vs.* Ins. Co. (55 N. Y., 222). *A fortiori* may a party to it, in such a controversy, prove by parol that it had existence. Thus the fact of a tenancy may be proved by parol, though there be a written lease (Rex *vs.* Kingston-upon-Hull, 7 B. & C., 611), which is recognized in Augustin *vs.* Challis (1 Excheq. [Wels. Hurl. & Gord.], 279), though it is there held that the lease must be produced if it is sought to show that rent was due. (See also, Whitfield *vs.* Brand, 16 M. & W., 282). The principle seems to be, that the contents of a written instrument cannot be given in evidence by parol, when the contract contained in it is the subject of the suit (per Parke, B., Strother *vs.* Barr, 5 Bing., 136); but, as is the inference, the existence of th relation under the instrument, and the fact of the existence of it, may be. (See Davis *vs.* Reynolds, 1 Starkie's N. P., 92)."

And this Court has held that, in respect of bills of lading, even as between the parties, parol evidence is admissible to contradict or explain the statements therein contained as to the shipment of the goods, and their character, condition and quality.

The Lady Franklin, 8 Wall., 325.
The Thames, 14 Wall., 98.

Fourth.

Reply to Brief for Plaintiffs in Error.

1. The radical fallacy in the brief for the plaintiffs in error, is the assumption that the Bowermans were under no obligation to Burgess & Sons, except that created by a specific agreement "to do a particular thing." The cases cited are all cases arising between parties who were under no obligation to each other, and the question was whether a contract had been made by letters. The Courts held that the party receiving an offer was under no obligation to reply to it, and that, therefore, an acceptance of the offer could not be inferred from silence. This rule has no application whatever to the case of agency. The agent is under obligation as shown in the first point, "to use great diligence and care for his principal; all that a reasonable man under like circumstances would take of his own affairs." It is evident that up to a certain point, the Bowermans complied with this obligation, and recognized its existence. They took all the steps preliminary to a suit. Except as such preliminary, the protest and appeal filed by them (pp. 29, 31), were futile. It was well known what the decision of the Collector and of the Secretary of the Treasury had been on the same question when previously raised, and that the only redress of parties aggrieved thereby, was by action. Under these circumstances, the only course that a prudent man would pursue, would be to bring an action. This duty the Bowermans confessedly failed to discharge.

2. The second fallacy underlying the brief for the plaintiffs in error, is the assumption that the Bowermans were nothing more than sugar-brokers. The facts which show the contrary, are fully stated under the first point. The complaint nowhere describes them as brokers, but as agents. The duty of a mere broker

is only to sell and remit. But the defendant's duty was "to enter the sugars in the Custom House, and do all acts which should be necessary and proper, respecting the ascertainment and liquidation of the duties thereon." This is the allegation at page 3, and the proof on pages 27 and 28 fully sustains it. One of these acts was to enter a suit to recover duties illegally exacted. It may be that in cases where no distinct controversy had arisen in regard to the proper rate of duty, no such obligation would devolve upon the agent by reason of his being a factor and employed as stated in the complaint. But where there is a well known controversy, and the decision of the Secretary of the Treasury is adverse to the importer, while the decision of the Circuit Court is in his favor, and the bringing of a suit is necessary in order to secure the benefit of this decision, it is as much a part of the agent's duty to enter a suit, as it is to file a protest, or a notice of appeal.

3. The third fallacy underlying the brief for the plaintiffs in error, is the assumption that the principal has no right to give instructions, unless the agent is bound to do the act therein mentioned without instructions. This is exactly the reverse of the rule laid down in the cases cited under the second point. The duty is created by the instructions. The whole object of the instruction is to point out to the agent his duty. If he does not choose to obey the instructions, he should decline the agency. It is bad faith in him to allows his principal to assume that he will carry out the instructions, and then neglect them altogether. Under such circumstances, the maxim applies—*Qui tacet consentire videtur.*

Broom, Legal Maxims, p. 787.

The brief claims that the allegation in the third article of the complaint, that Burgess and Sons relied upon the Bowermans bringing suit, pursuant to the instruc-

tions contained in the exhibits, is an implied admission that there was no antecedent duty upon the Bowermans. No such construction can properly be placed upon the allegation. It is true that the complaint does rely upon the instructions and agreement contained in the exhibits, but it also, in its first article, alleges the employment of the defendant to do all the acts which shall be necessary and proper, respecting the ascertainment and liquidation of the duties on sugar (p. 3). There is nothing inconsistent in these allegations. If there was a duty, as we claim, on the Bowermans, antecedent to the instructions, it was reinforced, and made clear by instructions. A child is under an obligation to speak the truth, antecedent to any instruction from his father. The command makes the duty clear, but the fact of the command is in no wise inconsistent with the antecedent existence of the obligation.

4. The fourth fallacy running through that part of the brief, which relates to the Bowermans' agreement to bring suit in due season, is the claim that it was necessary that there should be an independent consideration passing to the Bowermans, moving them to bring suits.

A. This overlooks the fact that they were not gratuitous agents, but received a compensation by way of commissions, from Burgess & Sons. They were under no obligation to undertake the agency, and if dissatisfied with the commissions, could relinquish it at any time. They cannot now allege that the compensation was inadequate. Indeed, the service necessary for the bringing of the suits was of the slightest character. If the Bowermans had sent to any one of the many lawyers in New York City, who practice in the Federal Courts, copies of the invoices, the protest and the notice of appeal, with a letter requesting him to bring an action, this would have fulfilled their duty. His retaining fee, if he asked one, they were in funds to pay (p. 28), and, as shown

under the first point, the expense would have been a legitimate charge against the balance in their hands, belonging to Burgess & Sons.

B. The injury to Burgess & Sons, caused by the failure of the Bowermans to comply with their agreement to commence the necessary suits, was of itself a sufficient consideration for the promise.

1 Parsons Contr., 431.
White *vs.* Baxter, 71 N. Y., 254.

"Damage to the promisee constitutes as good a consideration as benefit to the promisor."

Townsley *vs.* Sumrall, 2 Peters, 170, 182.

C. The case of Thorne *vs.* Deas, cited by the plaintiffs in error, and kindred cases all admit that an agent who receives a commission is liable for nonfeasance, and that a gratuitous promisor is liable for misfeasance. In the case at bar, the agents not only received a commission, but were guilty of misfeasance.

They completed the preliminary acts, filed the protest and the notice of appeal, but neglected to complete the undertaking by employing an attorney. They were as much guilty of misfeasance as a builder would be who should begin the construction of a house and leave it without a roof.

5. The counsel for the plaintiffs in error mistakes the effect of the correspondence when he claims that the fact that no suit had been brought by the Bowermans for Burgess & Sons, shows there was an express agreement that none should be brought. There is no evidence that any occasion had ever arisen for bringing suits. It appears from the correspondence, notably, Exhibits 15 and 17, pp. 27, 29, that the occasion for bringing suits did not arise in reference to all the cargoes of sugar. It seems that any one reading the

letters in evidence can hardly be serious in the contention that there was an express agreement that the Bowermans were not to bring suit. The counsel for the plaintiffs in error claim that the letter Exhibit 14, p. 27, is open to a different construction from that which is given it in this brief, and that the latter clause of the letter should be interpreted to mean "you will," instead of "we will." But a more natural construction is that the word "we," which begins the letter, applies to both the clauses connected by the conjunction "and": "we presume" and "we will." This letter is to be interpreted, if there be any ambiguity in it, in connection with the two following letters: Exhibit 15, p. 27; Exhibit 17, p. 29. It is evident from these two letters,

First, that Burgess & Sons expected that the Bowermans would enter suits in New York, and that the Bowermans, bearing this in mind, made entries in their books in reference to the proceedings to obtain a refund of the duties, and that they had made an entry appropriate for this purpose, against the cargo of July 6th, 1880. Why should they have done all this, unless they did at the time admit their obligation, and express their agreement to commence suits against the Government in season? These letters are also to be construed with reference to Exhibits, 1 and 2 (pp. 24, 25), which were especially relied upon by the defendants in error upon the trial. The latter part of Exhibit 1 is not printed by plaintiffs in error in their brief. The part thus omitted is the vital part. "If the sugars are marked up on the dry-test, it is necessary to formally protest against the decision of the collector, and then appeal to the Secretary of the Treasury. This is the first step; and *when the duties are paid, to enter suit.*" The answer to this letter is not ambiguous. The Bowermans write, "Your favor of yesterday is received and contents noted; *all of which will be duly attended to.*" The commencement of suit is part of the "*all.*" It will be observed that in

this letter, while Burgess & Son leave to the Bowermans the selection of a lawyer, they still make a suggestion to employ the one retained by Messrs. Knowlton, thus clearly indicating that some lawyer was certainly to be retained by the Bowermans.

6. The counsel for the plaintiffs in error seems to think that some burden would have been imposed upon the Bowermans by their entering suit against the collector. This also is a misapprehension. If the Bowermans had placed the matter in the hands of an attorney, and had informed him of the names of the real party in interest, no liability whatever would have been imposed upon them. They would not have been liable as parties upon the record, for the suit would not have been brought in their names. They would not have been liable otherwise, because an agent who discloses his principal, and does not personally bind himself, is not personally liable.

2 Kent. Comm., 630.
Metcalf *vs.* Williams, 104 U. S., 93.

Burgess & Sons, as has been shown, were the real owners of the sugar, and as such entitled to the refund of the duties, although the goods were entered in the names of the Bowermans, and the protest and notice of appeal were signed by them. The suit could, therefore, have been brought in the name of the Bowermans.

Mason *vs.* Kane, Taney, 173.

They were the real parties in interest, and could, therefore, sue in their own names, under the New York Code, Section 449.

"Every action must be prosecuted in the name of the real parties in interest, except that * * a trustee of an express trust * * may sue without joining with him the person for whose benefit the action is prosecuted."

Under this latter clause, even if Burgess & Sons had been merely agents for the Havana shippers, they could still sue in their own names, upon their contract with the Bowermans.

Lundberg *es.* Iron and Steel Co., 121 U. S., 451.

Fifth.

The judgment should be affirmed, with costs.

EVERETT P. WHEELER,
Of Counsel for Defendants in Error.

At the top of page 8 of Mr. [illegible] entire misapprehension of the language of our letter of June 18, 1881, Ex. 14; perhaps caused by the typographical error in my reprint of it, on p. 16 of my brief. Reference to the record, at pp. 15 and 27, shows the purport of that letter to be the precise reverse of what is indicated upon said page 8 of my opponent's brief.

125-155

Supreme Court of the United States,

OCTOBER TERM, 1887.

BOWERMANS vs. ROGERS ET AL.	No. 187.

Reply Brief for Plaintiffs in Error.

Manifestly, the plaintiffs in error were agents *only* in their capacity as sugar brokers, for a commission.

As the Court (Rec. 33, bot.) *excluded* evidence of the duties of such agents, we assumed (as the Court there did) that this action did not base itself upon the relation of principal and agent. Now, the defendants in error rest it *wholly* upon that relation.

To the "FOURTH" division of their brief, pp. 11 to 17,—being their 'reply' to ours, we respond:—

I.

The "great diligence and care" which an agent owes to his principal relates only to those matters which are within the scope of his agency, and is limited thereby.

As to things *outside* the agency, the parties stand toward each other just as if no such relation existed at all.

Ex gv., the stevedore who discharged this sugar, and the teamster who hauled it from the wharf to the warehouse, owed a duty of care; but when he had discharged the stipulated function, *all* obligation ceased.

So, the question comes back, whether the bringing of suits *was* within the scope of the Bowermans' agency: and the Court should not have directed a verdict upon the ground that no testimony was admissible to show the limitations upon a sugar broker's agency.

II.

Though the *complaint* may not designate Bowerman Bros. as "sugar-brokers", the *evidence* shows this was their *only* relation to Burgess & Sons.

As sugar-brokers, they were bound to enter the goods, and do all business at the Custom-House; *i. e.*, *everything which was preliminary to putting the goods upon the market*—and nothing further.

Their duty "to sell and remit" (Defts. br., 12, top) could not be performed without doing everything essential to obtain, and transmit to the purchaser, the possession of the sugars.

III.

Without here examining at length into the extent to which a principal may instruct his agent, we assume that there is *this* limitation to the right,—that he cannot

impose an obligation entirely outside the subject-matter of the original employment.

Ex gr., the ship-master or warehouseman could utterly ignore orders to enter, or to bring suit: or a sugar-broker to buy stocks.

If the question is as to the limitations upon *our* agency, we were entitled to prove them by the excluded testimony.

Observe, that the obligation averred in the complaint (see defts.' brief, p. 13, near top) to act "in the *ascertainment and liquidation*" of duties does not embrace that of suing for the recovery of any *illegally* exacted. This ascertainment and liquidation is done entirely at the Custom-house, in order to bring the goods into the market.

We here apply the maxim, *Expressio unius*, etc.

IV.

As to what our opponents call (their brief, p. 13, § 4) our "fourth fallacy"—for we are following their divisions in this reply—as to the necessity of a consideration:—

A. So far as the trouble and responsibility of bringing suits was concerned, the Bowermans *were* sought to be made "gratuitous agents";—for the testimony admitted *(saying nothing of that excluded)* shows that their one-quarter-of-one-per-cent commission did *not* cover it.

B. How White v. Baxter, 71 N. Y., 254, (cited by defts. in error) or the cases of which it is a representative, affects the present issue, we do not perceive.

Burgess and Sons made *no* promise whatever to Bowerman Bros.; *nor do they profess 'reliance' upon any made by the latter*,—but upon a *failure* to promise. (Rec., 28, bot.) We did not ask them *not* to begin suit themselves. We simply made *no* reply to that part of their letter of June 15, having notified them to sue June 18, 1881. (Rec., 27, top.)

C. An agent who receives a commission is *only* liable for non-feasance of that which his commission pays him for doing.

V.

It still seems to us that *they* should prove an agreement *to sue*; not that we should show that it was agreed we should *not* sue.

VI.

If Bowerman Bros. employed counsel, they would have made themselves liable. This is the rule where the principal, if disclosed, *resides out of the jurisdiction*.

But if the Bowermans sued (as deft.'s very next paragraph, p. 16, suggests) in their own name, they would certainly become exclusively liable to the attorney.

And if (as the next paragraph, p. 17 top, suggests) the foreign owners were the principals, a disclosure of them would not relieve their agents here from personal responsibility.

VII.

The judgment should be *reversed*, and all the testimony showing the character and extent of the agency be received and considered, if the claim rests upon this relation.

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